SEP 27 1974

MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1974

## No. 74-349

HUSMAN EXPRESS COMPANY

Petitioner

v.

BRYAN TRUCK LINE, INC.

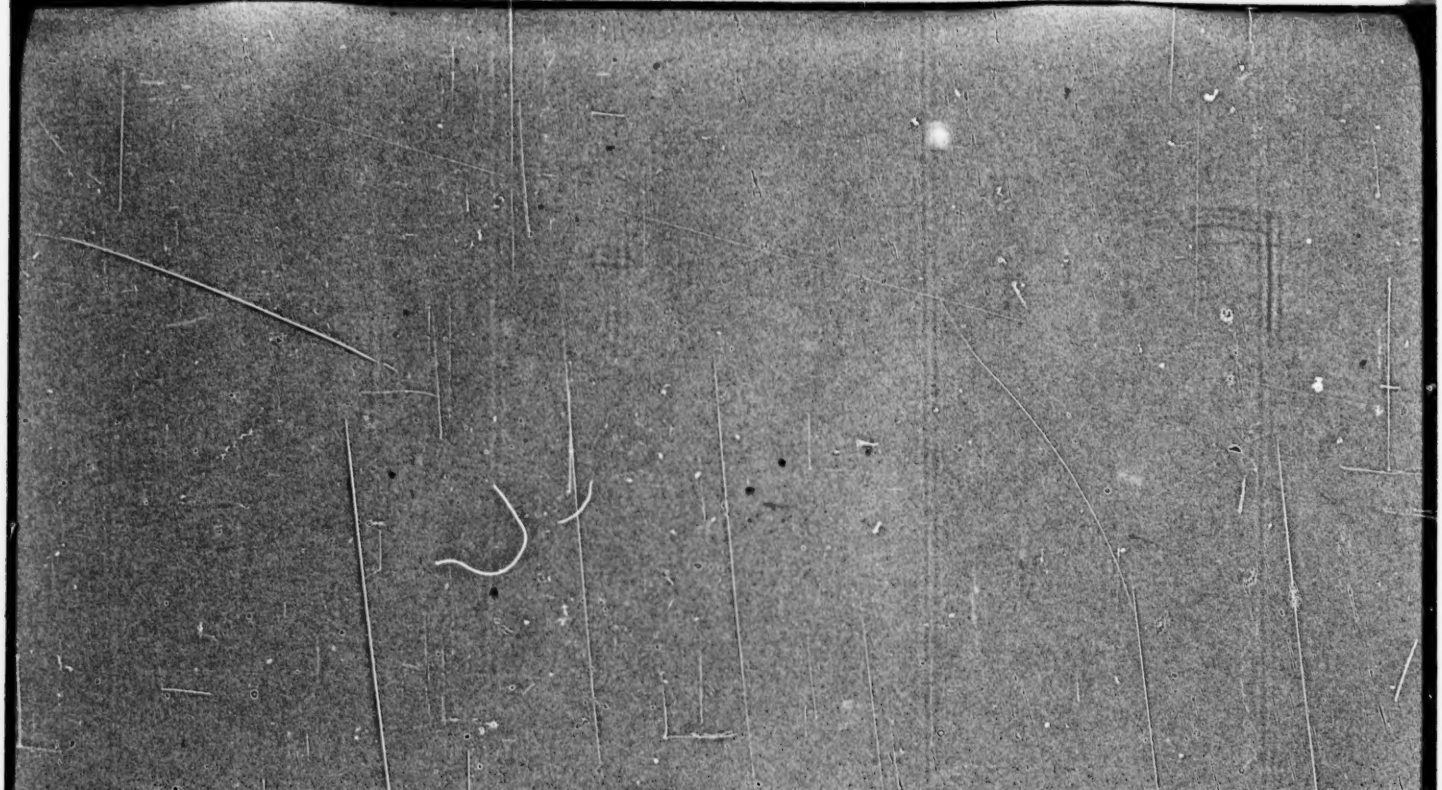
Respondent

# PETITION FOR WRIT OF CERTIORARI

To The Supreme Court
of The State of Ohio

PAUL F. BEERY
Paul F. Beery Co., L. P. A.
Ninth Floor
8 East Broad Street
Columbus, Ohio 43215
(614) 228-8575
*Counsel for Husman Express Company*

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216



## TABLE OF CONTENTS


| | Page |
|---|---|
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Question Presented | 2 |
| Constitutional Provision Involved | 3 |
| Statement | 3 |
| The Public Utilities Commission of Ohio Proceeding | 3 |
| The Supreme Court of Ohio Proceeding | 4 |
| Federal Question | 5 |
| Argument | 5 |
| I. THE SUPREME COURT OF OHIO ARBITRARILY DENIED PETITIONER THE RIGHT TO PERFORM INTRASTATE TRANSPORTATION SERVICE | 5 |
| II. IF THE SUPREME COURT OF OHIO HAD RESERVATIONS AS TO PETITIONER'S ABILITY TO PROVIDE SERVICE, THEN THE CASE SHOULD HAVE BEEN REMANDED TO THE PUBLIC UTILITIES COMMISSION OF OHIO | 13 |
| III. THE OHIO SUPREME COURT DECISION SHOULD BE REVERSED | 15 |
| IV. CONCLUSION | 16 |

Appendix:

(A) Opinion and Order of the Ohio Supreme Court In Bryan Truck Line Inc. v. Public Utilities Commission of Ohio (1974) ..... 17

(B) Opinion and Order of the Public Utilities Commission of Ohio, In the Matter of the Application of Husman Express, Co. for an Irregular Route Certificate (1973) ..... 22

(C) Opinion and Order of the Ohio Supreme Court in Mohawk Motor, Inc. v. Public Utilities Commission of Ohio (1967) ..... 32

(D) Opinion and Order of the Public Utilities Commission of Ohio, In the Matter of the Application of Husman Express Co. (1966) ..... 40

(E) Motion for Rehearing Submitted to the Ohio Supreme Court (1974) ..... 46

(F) Order of the Ohio Supreme Court Denying Rehearing ..... 62

(G) Selected Portion of the Public Utilities Commission of Ohio Transcript ..... 63

## TABLE OF AUTHORITIES

*Bryan Truck Line, Inc. v. Public Utilities Commission of Ohio*, et al, 38 Ohio St. 2d 103, 310 N.E. 2d 587 (1974) ..... 4, 9

*Mohawk Motor, Inc. v. Public Utilities Commission of Ohio*, et al, 11 Ohio St. 2d 238, 228 N.E. 2d 611 (1967) ..... 5, 7

*Motor Service Company, Inc. v. Public Utilities Commission of Ohio*, et al, 39 Ohio St. 2d 5 (1974) 14

*Patton v. State of North Carolina*, 256 F. Supp. 225 (W.D. North Carolina, 1966) ..... 12

*Troyer v. Public Utilities Commission of Ohio*, 37 Ohio St. 2d 129, 308 N.E. 2d 752 (1974) ..... 12

*Williams v. Tooke*, 108 F. 2d 756 (5th Cir., 1940), cert. denied 311 U.S. 655, 61 S. Ct. 8, 85 L. Ed. 419 (1940) ..... 12

Amendment XIV to the U. S. Constitution ..... 3

Ohio Revised Code §4903.13 ..... 15

IN THE

# Supreme Court Of The United States

OCTOBER TERM, 1974

---

## No.

---

HUSMAN EXPRESS COMPANY[1]

Petitioner

v.

BRYAN TRUCK LINE, INC.

Respondent

---

# PETITION FOR WRIT OF CERTIORARI

**To The Supreme Court of The State of Ohio**

---

## OPINIONS BELOW

Petitioner seeks review by this Court of the opinion of the Supreme Court of the State of Ohio in *Bryan Truck Line, Inc. v. Public Utilities Commission of Ohio*, et al, (A. 17),[2] which is reported at 38 Ohio St. 2d 103, 310 N.E. 2d 587 (1974). This decision overruled the opinion and order of the Public Utilities Commission of Ohio *In the Matter of the Application of Husman Express Co., for an Irregular Route Certificate*, (A. 22), which is not officially reported.

---

[1] Husman Express Co. is a wholly-owned subsidiary of T.I.M.E.-DC, Inc. A merger of Husman into the parent corporation is to be consummated in the near future and at that point T.I.M.E.-DC, Inc. will be substituted as the party of record.

[2] "A." refers to the Appendix.

Related to the above two proceedings, however, is the opinion of the Supreme Court of the State of Ohio in *Mohawk Motor Inc. v. Public Utilities Commission of Ohio, et al.* (A. 32), reported at 11 Ohio St. 2d 238, 228 N.E. 2d 611 (1967) and the opinion and order of the Public Utilities Commission of Ohio *In the Matter of the Application of Husman Express Co., for an Irregular Route Certificate* (A. 40), which is not officially reported.

## JURISDICTION

The judgment and opinion of the Supreme Court of the State of Ohio were entered on April 24, 1974. Petitioner filed a timely motion for rehearing on May 6, 1974 with the Supreme Court of Ohio (A. 46). On June 6, 1974, the Court denied the motion (A. 62).

The jurisdiction of the United States Supreme Court to review this decision of the Supreme Court of the State of Ohio rests on 28 U. S. C. § 1257 (3).

By application dated August 20, 1974, petitioner sought an extension of time within which to file this petition for writ of certiorari. By order dated August 26, 1974, Justice Thurgood Marshall granted the extension making the petition due on September 28, 1974.

## QUESTION PRESENTED

Whether, in reversing the Order of the Public Utilities Commission of Ohio the Supreme Court of the State of Ohio deprived petitioner of the opportunity to provide intrastate transportation service from and to Bryan, Ohio without due process of law in violation of the 14th Amendment to the United States Constitution by erroneously and abritrarily finding that the record was "totally devoid of any evidence" that petitioner would provide the needed overnight transportation service. In fact, the Supreme Court's statement is contrary to the

evidence of record. Accordingly, the reversal of the Public Utilities Commission of Ohio Order and the consequent denial of petitioner's application by the Supreme Court of Ohio is an arbitrary act that deprives petitioner of its opportunity to provide transportation service from and to Bryan, Ohio.

## CONSTITUTIONAL PROVISION INVOLVED

**Amendment XIV to the U. S. Constitution (in part):**

1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

## STATEMENT

Petitioner contends that the Supreme Court of Ohio acted arbitrarily when it denied petitioner the right to perform intrastate transportation service by making a finding that is not supported by the evidence, and this erroneous finding resulted in the denial of the application.

**The Public Utilities Commission of Ohio Proceeding**

In February, 1970, Husman Express Company filed an application with the Public Utilities Commission of Ohio for a certificate of Public Convenience and Necessity to transport property in intrastate commerce over irregular routes from and to Bryan, Ohio. A hearing on the application was conducted before an Attorney Examiner

on March 12, 1970. Bryan Truck Line, Inc., which held a Certificate of Public Convenience and Necessity previously issued by the Public Utilities Commission of Ohio to transport property over irregular routes from and to Bryan, Ohio, was represented at this hearing and sought to have the application denied.

In its Order, the Commission recommended a grant of the requested authority to petitioner.

**The Supreme Court of Ohio Proceeding**

Protestant, Bryan Truck Line, Inc., appealed the decision of the Public Utilities Commission of Ohio to the Supreme Court of Ohio and the Supreme Court of Ohio reversed. The Court agreed with the Commission that the record disclosed a need on behalf of the public shippers for prompt, less-than-truckload freight service from and to Bryan, Ohio, but the Court nevertheless held that Petitioner had not proven it would provide the needed service. The Court stated:

> Assuming that there is sufficient evidence in the record to support the commission's finding of a need for overnight, less-than-truckload service from and to Bryan, Ohio, *the record is totally devoid of any evidence that either applicant would, if its application for a certificate were granted, provide the overnight service.* The Order of the Commission is unreasonable and unlawful, and is, therefore, reversed. *Bryan Truck Line, Inc. v. Public Utilities Commission of Ohio*, 38 Ohio St. 2d 103, 106, 310, N.E. 2d 587, 589 (1974). (emphasis Added). (A. 21).

This petition for writ of certiorari seeks reversal of the Supreme Court of Ohio decision on the ground that the record contains substantial evidence (over 8 pages of transcript plus exhibits) (A. 48-53, 60-61) demonstrating petitioner's ability to provide and its willingness to provide the needed overnight transportation service and the

finding by the Court that the record is "totally devoid" of such evidence is therefore arbitrary, capricious and unreasonable and constitutes a deprivation of petitioner's rights and property without due process of law. It is this single erroneous finding by the Court that resulted in the reversal of the Order of the Public Utilities Commission of Ohio.

## FEDERAL QUESTION

The Federal question in this case was first raised in the Motion for Rehearing which was timely and properly filed with the Supreme Court of the State of Ohio on May 6, 1974. The question could not have been raised earlier because it was not until the Supreme Court rendered its decision that petitioner's constitutional right to due process of law was violated.

## ARGUMENT

### I.

### THE SUPREME COURT OF OHIO ARBITRARILY DENIED PETITIONER THE RIGHT TO PERFORM INTRASTATE TRANSPORTATION SERVICE

Unless the Supreme Court of the United States grants this Writ of Certiorari, petitioner will be forever deprived of the opportunity to provide intrastate transportation service for the public at Bryan, Ohio. For over nine years, petitioner has been trying to obtain such authority.

In February, 1965, petitioner first filed an application with the Public Utilities Commission requesting authority to transport property from and to Bryan, Ohio and the Public Utilities Commission recommended that said authority be granted. On appeal to the Supreme Court of Ohio, in *Mohawk Motor, Inc. v. Public Utilities Commission of Ohio, et al*, 11 Ohio St. 238, 228 N.E. 2d 611

(1967), (A. 32), the Court reversed the Order of the Public Utilities Commission and denied petitioner's application. The Court reversed on the ground that assuming a deficiency in service did exist, the granting of the proposed certificate would not correct the deficiency because the service to be provided under it would largely duplicate the existing service and would not be an overnight service.

Petitioner thereafter processed a second application, designed specifically to answer those questions raised by the Supreme Court in its first decision. Again, the Public Utilities Commission of Ohio authorized petitioner to perform the requested service, and again, the Supreme Court of Ohio reversed the Commission and denied the application.

Both the first and second reversals were arbitrary. In the first Supreme Court decision, the Court refused to accept the procedure proposed by petitioner for transporting the less-than-truckload shipments, even though all the evidence supported the feasibility of petitioner's proposed service. The Court reversed the Commission's Order stating that petitioner had not established its capability of providing overnight service. Accordingly, petitioner provided substantial evidence as to its method of providing the proposed service in the second proceeding. When the second case was appealed to the Supreme Court of Ohio, all questions were answered. The Court, nevertheless, reversed the Commission's decision and denied the request by making a finding not supported by any evidence. Thus, petitioner is placed in a position where it cannot obtain authority for intrastate transportation service because of the Supreme Court of Ohio. The Court made a finding that resulted in the denial of petitioner's application when there is no evidence to

support such a finding. Accordingly, petitioner's only legal recourse is to seek the aid of the Supreme Court of the United States.

In the first decision issued by the Public Utilities Commission of Ohio authorizing petitioner to perform service in intrastate commerce, the question was raised as to whether or not petitioner could transport less-than-truckload shipments by handling them in the normal method petitioner utilized in handling other intrastate shipments. The Court disagreed with this method of performing service and stated as follows:

> It is strange that neither the examiner, in his long report, nor the Commission in its opinion, did not make any reference or mention of the requirements fixed by Husman that if the certificate should issue all outbound traffic from Bryan would be required to go south to Cincinnati, some 200 miles, before it could be shipped to its destination. *Mohawk Motor Inc., the Public Utilities Commission*, 11 Ohio St. 2d 238, 241, 228 N.E. 2d 611, 614, (1967). (A. 36).

The Court obviously did not approve of the method of service proposed by petitioner even though the method is well accepted in the industry and is the only economically feasible method which may be used to handle less-than-truckload shipments. Furthermore, the examiner had, in fact, stated in his report that all movements from and to Bryan, Ohio would be made through Cincinnati.

The Court's disapproval of petitioner's proposed method of operation appeared to be a strong contributing factor in the Court's holding, which was the following:

> From a consideration of the entire record it appears doubtful that there is a deficiency in present transportation service. If any such deficiency can be claimed, it is abundantly clear that the proposed

> certificate will not, in any way, correct any such deficiency, but will largely duplicate service already established and in use, and, at the same time, will fail to provide overnight transportation service to and from Bryan, Ohio. *Mohawk Motor, Inc. v. Public Utilities Commission of Ohio, et al, supra* at 243 and 615. (A. 38).

In deciding the first case, the Supreme Court of Ohio became a trier of fact, as if it served in the same capacity as that served by the Public Utilities Commission of Ohio. It did not answer any questions of law. The Supreme Court merely disagreed with certain factual findings and thereafter, reversed the Commission's Order. One should note that the Court did not remand the case to the Commission for further findings as to those factual questions. It just arbitrarily reversed.

Petitioner had no alternative but to thereafter file a second application with the Public Utilities Commission of Ohio. Petitioner did so in February, 1970. In this proceeding, petitioner directed its evidence to answer all the questions first raised by the Supreme Court in the original case. Needless to say, these questions were throughly discussed and adequate evidence presented to answer them. Again, the Public Utilities Commission granted the request and applicant had reason to believe that it would now finally be afforded the opportunity to provide intrastate transportation service. Approximately nine years had elapsed since the filing of the original application.

On appeal however, the Court again acted in a manner as if it were hearing the case de novo. It made a finding of fact as to applicant's ability to provide service which is erroneous and not in any way supported by the record.

In the Public Utilities Commission proceeding, applicant established (1) its terminal facilities that were

needed to perform service, (2) the equipment that it had which was utilized to perform this service, (3) its many years of experience in transporting less-than-truckload shipments in intrastate commerce, (4) the method that would be utilized in performing service, (5) its knowledge as to the regulations of the Public Utilities Commission of Ohio, and (6) its qualified personnel that would be utilized in performing service. The Court apparently ignored all this evidence and simply stated:

> Assuming that there is sufficient evidence in the record to support the commission's finding of a need for overnight, less-than-truckload service from and to Bryan, Ohio, *the record is totally devoid of any evidence* that either applicant would, if this application for a certificate were granted, provide the overnight service. The order of the Commission is unreasonable and unlawful and is, therefore, reversed. *Bryan Truck Line, Inc., v. Public Utilities Commission of Ohio,* 38 Ohio St. 2d 103, 106, 310, N.E. 2d 587, 589 (1974) (emphasis added). (A. 21).

Petitioner contends that such a holding, when the record of this case is considered, is arbitrary, capricious and unreasonable. It not only affects petitioner, but also the public of Bryan, Ohio, especially those shippers who have supported petitioner in both application proceedings. The people in Byran, Ohio have been deprived of the overnight, less-than-truckload service which they need and which petitioner has demonstrated it can provide.

In Bryan Truck Line's brief to the Supreme Court of Ohio, respondent alleged in error that petitioner had not established on the record that it would perform the needed overnight, less-than-truckload service. This unqualified and erroneous allegation is based upon the answer to a single question by petitioner's witness pertain-

ing to service that would be provided several small towns in the southeastern portion of Ohio described in the record as the "river towns down East." (A. 63). These towns are located in a basically rural area of Ohio and most of the towns are over two hundred (200) miles from Bryan, Ohio, which is in the extreme northwestern corner of Ohio. Petitioner honestly answered that the service *to these towns* would not be dependable overnight service. (A. 63). Petitioner indicated that it could not serve the area economically, but that it would make every effort to see that freight was delivered to every point for which it was destined. (A. 65).

As to nearly all other points in Ohio, overnight service can be rendered and petitioner even introduced an exhibit in which truck numbers, the method of handling, and examples of its service were given. (A. 62). The Attorney Examiner of the Public Utilities Commission of Ohio specifically asked petitioner's witness if the general service provided via the method depicted in the exhibit had been overnight service and the witness answered in the affirmative (A. 64).

It may be that the Supreme Court of Ohio was confused by the erroneous statement by Bryan Truck Line, Inc. in its brief. The statement of Bryan Truck Line was misleading in that it implied petitioner could not provide the needed overnight, less-than-truckload service to any points in the state when, in fact, it can provide this type service to almost all points in the state. Nevertheless, it is difficult to explain how the Supreme Court of Ohio could make a finding that the record is "totally devoid" of *any* evidence that petitioner would provide the overnight service when the brief of Bryan Truck Line was based on a statement in the record concerning only a small portion of Ohio, namely the "river towns down East."

The record clearly establishes that there is no foundation for the Court's decision. The arbitrariness of the decision fully comes to light when one realizes that petitioner recited verbatim, in both its brief and its motion for rehearing, the eight pages of transcript (A. 48-53) and the two page exhibit (A. 60-61), which specifically describe the method of operation utilized by petitioner to render overnight transportation service from and to many parts of Ohio and how that service could and would be extended to Bryan, Ohio in an economically feasible manner.

The Supreme Court of Ohio has not raised or answered any questions of law, either in the first or second decision. In the first proceeding, it disagreed with certain facts and thereafter denied the request. In the second proceeding, it made a finding of fact without any support and then denied the request. Thus, petitioner can no longer hope to answer these questions of fact raised by the Court, because petitioner now clearly knows that even if the facts are provided, this Court will deny the request. Accordingly, petitioner's only legal recourse is in seeking this Writ of Certiorari from the United States Supreme Court.

If this decision is permitted to stand, the people in Bryan, Ohio will be denied access to the services of petitioner even though petitioner proved there was a public need for overnight transportation service.

One must remember that this case was supported by the Ohio Art Company, a toy manufacturer which employs approximately 600 people at its plant and warehouse in Bryan, Ohio; Spangler Candy Company of Bryan, Ohio, which employs approximately 400 people at the peak season; and the Aro Corporation of Bryan, Ohio, which employs more than 1,200 people. Accordingly, this is a case in which the Supreme Court of Ohio.

by its arbitrary act, not only affected petitioner, but also the people of the State of Ohio.

For all of these reasons, petitioner contends that its constitutional right to due process of law has been violated. As stated in *Williams v. Tooke*, 108 F. 2d, 758, 759 (Fifth Cir. 1940), cert. denied 311 U.S. 655, 61 S. Ct. 8, 85 L. Ed. 419 (1940):

> If all the judgments complained of were merely erroneous that would not amount to a denial of due process of law. (Citations ommitted). However, if a case between private parties is *arbitrarily and capriciously* decided, in violation of settled principles of law, *and contrary to undisputed facts*, though the Court so deciding had jurisdiction over the suit, the judgment may be in violation of the fourteenth amendment. *Postal Telegraph Company v. Newport, Kentucky*, 247 U.S. 464, 38 S. Ct. 566, 62 L. Ed. 1215. (emphasis added).

Furthermore, as stated in *Patton v. State of North Carolina*, 256 F. Supp. 225, 236 (1966):

> Protection of the individual from arbitrary action is the very essence of due process of law. *Slochower v. Board of Higher Education, City of New York*, 350 U.S. 551, 76 S. Ct. 637, 100 Lawyers Ed. 692 (1956).

The Supreme Court of Ohio has recognized a principal of law in a recent case, which, if followed by the Court, would be dispositive of this case. In *Troyer v. Public Utilities Commission of Ohio*, 37 Ohio St. 2d 129, 308 N.E. 2d 752 (1974), the Court reversed an order issued by the Public Utilities Commission and found that uncontradicted and unchallenged sworn testimony by a carrier that it had complied with an order of the Public Utilities Commission was sufficient to meet its burden of proof. The Court held:

> Since appellant's testimony and the other evidence introduced at the hearing establish the correctness of the Attorney Examiner's conclusions upon the issue of compliance, the Commission's Order is unreasonable and unlawful, and is, therefore, reversed. *Troyer v. Public Utilities Commission of Ohio, supra,* at 132 and 754.

The Court recognized that the evidence introduced at the hearing supported the Attorney Examiner's findings and when the Commission overruled the latter, the Court held the Commission's Order to be unlawful and unreasonable.

In the instant case, all the evidence supports the Commission's finding and order, but notwithstanding, the Court reversed the latter without any evidence to support its own finding that the record is "totally devoid" of any evidence that petitioner will provide the overnight service. Clearly, the Court has now acted in the same manner the Public Utilities Commission of Ohio acted in the *Troyer* case. In both cases, a finding was made without any evidence of record to support it.

## II.

## IF THE SUPREME COURT OF OHIO HAD RESERVATIONS AS TO PETITIONER'S ABILITY TO PROVIDE SERVICE, THEN THE CASE SHOULD HAVE BEEN REMANDED TO THE PUBLIC UTILITIES COMMISSION OF OHIO

The Supreme Court's act, in both the original and in the second case, provided petitioner with no method of answering the Supreme Court's allegations. There was no remand to the Public Utilities Commission of Ohio, but instead, the case was merely reversed. As far as the Court was concerned the case was at an end. Thus,

unless the Supreme Court of the United States provides a remedy, it will be the "end" not only for the petitioner, but also for the members of the shipping public in Bryan, Ohio.

It was not until the Supreme Court had reversed the Commission for the second time that petitioner fully appreciated the hopelessness of its position. The Court's act in this second case clearly establishes that, notwithstanding the evidence, the Supreme Court of Ohio will not permit this petitioner to serve the public.

If the Court had reservations, either in the first or second proceeding, about petitioner's qualifications to perform service, it could have remanded the case to the Commission for the taking of further evidence on this particular issue. The Court really acted as the "original" trier of fact. In the first case, it denied the request because it disliked the method petitioner proposed for providing service. In the second case, it appears not to even have considered the evidence, but denied the request by finding that petitioner could not provide the service.

The Supreme Court of Ohio is fully cognizant of the right to remand a case for further evidence. Its decision in the instant case was issued on April 24, 1974. Approximately 2½ months thereafter the same Supreme Court of Ohio decided a case wherein it questioned certain evidence and the case was remanded to the Public Utilities Commission of Ohio. In that case, *Motor Service Company, Inc. v. Public Utilities Commission of Ohio, et al,* 39 Ohio St. 2d 5, 15-16, (1974), the Court stated as follows:

> Nowhere in the Commission's opinion and order are there findings of fact or reasons supporting the issuance of the aforementioned orders, nor does any citation to the record indicate support for or reasons behind such orders.

> It is the opinion of this Court that the Commission failed to make specific findings of fact, supported by the record, or to state reasons derived therefrom, which prompted its decision, in violation of the requirements of R.C. 4903.09.
>
> For the foregoing reasons, the decision of the Public Utilities Commission is affirmed in part and reversed in part, and the cause is remanded to the Commission for further proceedings in accordance with this opinion.

Petitioner has difficulty in determining why, if in fact the Court questioned petitioner's ability to provide the service, the Court would not follow a similar procedure in the instant case and remand the case to the Public Utilities Commission for further hearing on that issue.

## III
## THE OHIO SUPREME COURT DECISION SHOULD BE REVERSED

Petitioner respectfully requests this Court to reverse the decision of the Supreme Court of Ohio and remand the case with the following instructions:

(1) The Supreme Court of Ohio shall review the evidence and the Order of the Public Utilities Commission of Ohio and thereafter make a finding in accordance with the standard established by Ohio Revised Code Section 4903.13:

> The final order made by the Public Utilities Commission shall be reversed, vacated or modified by the Supreme Court on appeal if, upon consideration of the record, such a Court is of the opinion that such order was unlawful or unreasonable.

(2) If the Supreme Court of Ohio, upon application of the standards established in said section of the

Ohio Revised Code, finds that the Order of the Public Utilities Commission and the evidence of record does not answer to its satisfaction the question of petitioner's ability to provide service then the Court shall remand the case to the Public Utilities Commission of Ohio for the purpose of obtaining additional evidence on that issue.

(3) If the Supreme Court of Ohio finds that, upon consideration of all the evidence, the Order of the Public Utilities Commission of Ohio is not unreasonable, then it shall affirm said order.

## IV
## CONCLUSION

The Order of the Public Utilities Commission of Ohio is based on substantial evidence of record which supports the agency's findings of fact and conclusions of law. Accordingly, the finding by the Ohio Supreme Court that the record is "totally devoid" of such evidence is arbitrary and capricous and in violation of petitioner's Fourteenth Amendment right to due process of law. Petitioner therefore requests this Court to reverse and remand the case to the Ohio Supreme Court with appropriate instructions.

Wherefore, petitioner prays that this Court grant the writ of certiorari sought herein.

Respectfully submitted,

PAUL F. BEERY
Paul F. Beery Co., L.P.A.
Ninth Floor
8 East Broad Street
Columbus, Ohio 43215
(614) 288-8575

*Counsel for Husman Express Company*

## APPENDIX A

BRYAN TRUCK LINE, INC.,
*Appellant,*

v.

PUBLIC UTILITIES COMMISSION OF OHIO et al.,
*Appellees.*

**No. 73-777.**

**SUPREME COURT OF OHIO.**

**April 24, 1974.**

In February 1970, Husman Express Company and Duff Truck Line, Inc., filed separate applications with the Public Utilities Commission for certificates of public convenience and necessity to transport property over irregular routes from and to Byran, Ohio. Both applications were later voluntarily restricted by the applicants against the transportation of household goods, office furniture and fixtures, commodities usually handled in dump trucks, and commodities which, by reason of size or weight, require special equipment to load or unload.

A hearing on both applications was conducted before an attorney-examiner on March 12, 1970. Appellant, Bryan Truck Line, Inc., which held a certificate of public convenience and necessity to transport property over irregular routes from and to Byran, and which sought to have the applications denied, was represented at this hearing.

On November 5, 1971, the examiner filed her report. She found that although there was a need shown for additional transportation service of less-than-truckload (LTL) freight from and to Bryan, there was insufficient evidence to support a finding that appellant Bryan Truck

Line was unable to provide the required service. The report recommended that both applications be denied.

This recommendation was rejected by the commission, in an opinion and order filed on May 24, 1973. The relevant sections of the opinion stated:

"(2) There is a public need for the overnight transportation of LTL shipments from Bryan, Ohio to points throughout the state of Ohio.

"* * *

"(6) Protestant currently may not possess sufficient equipment to provide the service needed by the public in Bryan, Ohio, but appears to be financially capable of obtaining such additional equipment.

"(7) Each of the applicants possess the necessary equipment, financial ability, experience and willingness to perform the service needed by the public in Byran, Ohio.

"* * *

"(5) A public convenience and necessity has been demonstrated by applicants for the overnight transportation of LTL freight shipments from and to Bryan, Ohio.

"* * *

"(7) The service being provided by protestant in Bryan, Ohio, is inadequate to meet the needs of the public shippers in that area.

"(8) There is an estblished need for additional service to the shipping public in Bryan, Ohio, and for the establishment of rates governing such service."

Pursuant to R.C. 4921.10, the commission gave appellant 60 days to improve it service by providing LTL freight service from and to Bryan on an overnight basis. The commission then ordered that both applications be

granted if, at the conclusion of a specified "compliance test period," the evidence was insufficient to show that appellant had improved its service as required.

Appellant's application for rehearing was denied by the commission. Appellant then perfected it appeal to this court as a matter of right.

Sanborn, Brandon & Duvall and James Duvall, Columbus, for appellant.

William J. Brown, Atty. Gen., Keith F. Henley, Marvin I. Resnik, Columbus, Stiverson & Alden and Berry & Kirk Co. L.P.A., for appellees.

PER CURIAM.

The certificates sought by the applicants would permit them to provide the same services which appellant is already authorized to provide. The decisional mechanism to be followed in such a situation is described in Motor Service Co. v. Pub. Util. Comm. (1974), 37 Ohio St. 2d 1, 305 N.E. 2d 788, as follows:

"R.C. 4921.12, read in conjunction with R.C. 4921.10, provides a two-tier process for the granting of a new certificate of public convenience and necessity in certain cases. Where an applicant seeks authority to furnish service over an irregular route or territory, and there exists a certificate holder already authorized to provide the service, the applicant must first show a need for its proposed additional operation. Such a showing by the applicant necessarily involves a demonstration that service being offered by the existent carrier fails, in some respect, to adequately meet the public convenience and necessity. If the commission agrees, after notice and hearing, that the current certificate holder's service is deficient, the commission must afford the holder a reasonable time within which to improve its service before

granting the applicant's request. In practice, an order is issued requiring the holder to remedy any deficiencies within 60 days. Thereafter, another hearing is held to determine whether that carrier has complied with the commission's order. This compliance hearing represents the second tier of the process required by R.C. 4921.12."

*Motor Service Co.* involved an appeal from an order as to the second tier of the process. The present case involves an appeal from an order as to the first tier.

[1, 2] An applicant for an irregular route certificate of public convenience and necessity to transport property from and to a specific location assumes the burden of proving not only that there is a need for such service, but also that the granting of the application will correct any deficiency in the service provided the public by an existing certificate holder. Mohawk Motor v. Pub. Util. Comm. (1967), 11 Ohio St. 2d 238, 228 N.E. 2d 611. If there is no evidence in the record to support a finding that an applicant has sustained those burdens, or if such a finding is manifestly against the weight of the evidence, a decision by the commission favorable to the applicant will be reversed as unreasonable. Mohawk Motor v. Pub. Util. Comm., *supra;* Mohawk Motor v. Pub. Util. Comm. (1953), 159 Ohio St. 77, 110 N.E. 2d 909; D. G. & U. Truck Lines v. Pub. Util. Comm. (1953), 158 Ohio St. 564, 110 N.E. 2d 587.

The record in the present case discloses that there is a need for prompt, less-than-truckload freight service from and to Bryan, Ohio. However, according to the commission's findings of fact, a public need was demonstrated for *overnight* less-than-truckload service. I redicated upon this finding, the commission concluded that a public convenience and necessity had been demonstrated by the applicants for overnight transportation of less-than-

truckload freight shipments, and appellant was ordered to provide this service. Additionally, the commission ruled that each applicant could provide the needed service, and therefore their applications would be granted if appellant failed to comply with the improvement order.

[3] Assuming that there is sufficient evidence in the record to support the commission's finding of a need for overnight, less-than-truckload service from and to Bryan, Ohio, the record is totally devoid of any evidence that either applicant would, if its application for a certificate were granted, provide the overnight service. The order of the commission is unreasonable and unlawful, and is, therefore, reversed.

Order reversed.

C. WILLIAM O'NEILL, C. J., and HERBERT, CORRIGAN, STERN, CELEBREZZE, WILLIAM B. BROWN and PAUL W. BROWN, JJ., concur.

## APPENDIX B

Before

## THE PUBLIC UTILITIES COMMISSION OF OHIO

**CASE No. 36,376**

IN THE MATTER OF THE APPLICATION OF HUSMAN EXPRESS CO., FOR AN IRREGULAR ROUTE CERTIFICATE,

and

**CASE No. 36,380**

IN THE MATTER OF THE APPLICATION OF DUFF TRUCK LINES, INC., FOR AN IRREGULAR ROUTE CERTIFICATE.

## OPINION AND ORDER

**May 24, 1973**

The Commission, coming now to consider the above-entitled matters, the applications therein, the protest to each application on behalf of Bryan Truck Lines, Inc., protestant, the report and recommendation of its attorney examiner filed November 5, 1971, the exceptions thereto of applicant Husman filed December 28, 1971, the exceptions thereto filed by applicant Duff December 28, 1971, the petition to reopen filed by applicant Husman December 28, 1971, the petition to reopen filed by applicant Duff December 30, 1971, the reply of Byran Truck Lines, Inc., protestant to both petitions to reopen filed January 4, 1972, the reply of protestant Byran Truck

Lines, Inc., protestant, to both petitions to reopen filed January 4, 1972, and being otherwise fully advised in the provisions of Section 4903.09 of the Ohio Revised Code, hereby issues its Opinion and Order.

**OPINION:**

Both applicants seek certificates of public convenience and necessity authorizing them to transport property from and to Bryan, Ohio, RESTRICTED against the transportation of household goods, office furniture and fixtures, commodities usually handled in dump trucks and unloaded by dumping, and commodities which, by reason of size or weight, require special equipment to load or unload.

Both applications are protested by Bryan Truck Lines, Inc., the holder of Certificate No. 2141-I authorizing the transportation of property from and to Bryan, Ohio.

An applicant for certificated authority must prove that there is a public convenience and necessity for the service proposed. When an applicant requests certificated authority in a territory already served by a protesting carrier, the applicant must show that the protesting carrier does not provide the service required or the particular kind of equipment required to furnish the service which the applicant proposes.

The instant application is supported by three shippers, Ohio Art Company, The Spangler Candy Company and Aro Corporation. All three shippers testified to a need for transportation of less-than-truckload (LTL) shipments to points throughout the State of Ohio. *All three shippers expressed a need for fast delivery so that each might remain in a competitive position.*

The evidence indicates that shipper, Ohio Art Company, ships toys to retail and wholesale distributors such

as Sears Roebuck and Company, J. C. Penney, W. T. Grant, G. C. Murphy and S. S. Kresge. The business is highly competitive and is seasonal in nature with peak periods in August and September, January and February, *It is most important to this shipper to have fast transportation service since its customers have little storage space and they need the merchandise involved in order to make promotions and sales.* Ohio Art ships approximately 2,700,000 pounds to points in Ohio annually and its average shipment would be approximately 500 pounds. Ninety-eight per cent of its shipments are less-than-truckload.

As to the shipper, The Spangler Candy Company, the evidence indicates that it ships to almost every town in the state over 2,000 population. Its business is also seasonal with peaks at Christmas, Halloween, Valentine's Day and Easter. In 1969 Spangler shipped 3,780,000 pounds intrastate, most of it in less-than-truckload shipments.

As to Aro Corporation, during January and February 1970, representative months, 152 shipments were made to Ohio points. All shipments of Aro Corporation move less-than-truckload.

There was substantial evidence indicating that protestant, Bryan Truck Lines, Inc., was unwilling to transport LTL freight and that the shippers have not been tendering the commodities to Bryan for transportation because Bryan has indicated it was not interested in this traffic.

There was evidence to the effect that another carrier, Mohawk, which has been active in transportation in the area involved, had lessened its activity. It is pointed out, however, that Mohawk is not a protestant in this matter and Bryan is.

Protestant, Bryan, owns 7 tractors, 11 van trailers, 1 open-top trailer and 1 straight truck. In addition, it leases 3 tractors and 5 trailers and stated that it has recently ordered 7 more trailers in order to meet increased busi-

ness resulting from the decline of service by Mohawk. With that amount of equipment, it would appear that Bryan, numberwise, would be competitive with applicants Duff and Husman. Bryan indicated it is willing and able to purchase additional equipment if the need for such arises.

In sum, the evidence indicates that there is a public convenience and necessity demonstrated for the service which the applicants propose to render. The evidence further demonstrates an emphasis on a public convenience and necessity for the transportation of LTL shipments. It further demonstrates that protestant, Bryan, has proper authority to perform the involved transportation, but that, notwithstanding its protestations of willingness, it has not treated this traffic as desirable in the past.

An excerpt from the attorney examiner's discussion which is considered here pertinent, reads as follows:

> "Furthermore, although Bryan Truck Lines has not been used to the full extent of its authority in the past because of the existence of Mohwak Motors, there is no reason why it should not be fully used at the present. The shippers should demand that it do so and tender such shipments to it."

The attorney examiner took the position that the applicant had failed to establish by the evidence that the protestant, Bryan, is not providing reasonable service to meet the needs of the supporting shippers, and the application should be denied and she so recommended.

The Commission finds that it is unable to agree with her recommendation.

The Commission is of the opinion that protestant Bryan has not rendered convenient and necessary service. Moreover, while it appears that Bryan is financially able to secure additional equipment, the petitions to reopen submitted by applicants each allege that Bryan does not have any additional equipment ordered, which

is contrary to the evidence presented by Byran at the hearing.

The Commission is of the further opinion that the conduct of protestant Bryan in the past has been such as to discourage requests from the shippers herein involved for overnight LTL service to many points in Ohio that it does not desire to serve. This can be viewed as nothing less than an abdication by protestant of its statutory responsibilities to the shipping public, which will not be tolerated by this Commission.

It would, of course, be proper for this Commission to reopen this proceeding on the basis of the allegation contained in the petition to reopen submitted by each applicant. Our disposition of this case and the provisions of the order contained herein, render such reopening unnecessary. While protestant Bryan has the experience, financial ability, and allegedly the willingness to perform the type of service required by the shippers which appeared in support of these applications, it has not provided such a service in the past and may not currently have sufficient equipment with which to provide such a service. Accordingly, protestant Bryan should be given a period of time under the provisions of Section 4921.10, Ohio Revised Code, within which to improve its service in the manner set forth below.

Since it appears that autumn is one of the seasons when the shippers' need for service is at a peak, the compliance period should extend through that season.

**FINDINGS OF FACT:**

(1) Applicants seek certificates of public convenience and necessity authorizing transportation of property to and from Bryan, Ohio; RESTRICTED against the transportation of household goods, office furniture and fixtures, commodities usually handled in dump trucks and unloaded by dumping, and commodities which, by reason of size or

weight, require special equipment to load or unload.

(2) There is a public need for the overnight transportation of LTL shipments from Bryan, Ohio, to points throughout the State of Ohio.

(3) Protestant, Bryan Truck Lines, Inc., possesses proper certificated authority to perform the transportation service needed by the public in Bryan, Ohio.

(4) Protestant's authority has not been utilized to its fullest capacity.

(5) Protestant possesses the necessary experience to enable it to provide the service proposed and protestant alleges it is willing to provide the service needed by the public in Bryan, Ohio.

(6) Protestant currently may not possess sufficient equipment to provide the service needed by the public in Bryan, Ohio, but appears to be financially capable of obtaining such additional equipment.

(7) Each of the applicants possess the necessary equipment, financial ability, experience and willingness to perform the service needed by the public in Bryan, Ohio.

## CONCLUSIONS OF LAW

(1) The applications are in proper form and publications have been made as required by law.

(2) The applicants have complied with the provisions of law and the rules and regulations of this Commission governing transportation by motor vehicles.

(3) The Commission has jurisdiction to hear and determine the issues involved.

(4) The applicants are proper parties to whom authority may be granted.

(5) A public convenience and necessity has been

demonstrated by applicants for the *overnight* transportation of LTL freight shipments from and to Bryan, Ohio.

(6) The protestant is presently furnishing service in the area involved.

(7) The service being provided by protestant in Bryan, Ohio, is inadequate to meet the needs of the public shippers in that area.

(8) There is an established need for additional service to the shipping public in Bryan, Ohio, and for the establishment of rates governing such service.

(9) Under these circumstances, and pursuant to the mandate of Section 4921.10, Ohio Revised Code, protestant Bryan should be given a period of time within which to improve its service in the following particulars:

(1) Adequately publicize in all media reaching the general public (including, but not limited to, newspapers, telephone directories and personal contact) that it has authority from this Commission to transport property, both in truckloads and in LESS-THAN-TRUCKLOADS from and to Bryan, Ohio and demonstrate such by appropriate business records at the compliance hearing.

(2) Acquire sufficient additional equipment to be used in the transportation of less-than-truckload shipments of property from and to Bryan, Ohio, to enable protestant to accomplish *overnight* LTL service requested by the shippers.

(3) File appropriate tariffs covering less-than-truckload (LTL) shipments, consistent with its existing authority. Tariff provision changes on one day's notice will be considered by the Commission.

(4) Accept all LTL shipments tendered to it by

the public for intrastate transportation from and to Bryan, Ohio and demonstrate such acceptance by appropriate business records at the compliance hearing.

(5) Maintain, for presentation to the Commission, a complete record of all requests for service received from shippers appearing in support of these applications, reflecting the name of the shipper requesting the service; the time and date the request was received; the weight of the shipment; the origin and destination points; and, if the shipment is accepted, the time and date of delivery.

(6) Inform, by personal contact, each of the public witnesses which appeared in support of the instant application, that Bryan Truck Lines, Inc., is willing and able to provide an *overnight*, LTL service from and to Bryan, Ohio and demonstrate such by appropriate business records at the compliance hearing.

(7) Provide, upon request, an *overnight*, LTL transportation service from Bryan, Ohio, to all points in Ohio.

(10) That the compliance period given protestant should extend from the date of this order through December 31, 1973.

**ORDER**

It is, therefore,

ORDERED, That the exceptions of Husman filed December 28, 1971, and the exceptions of Duff, filed the same date, to the extent they are inconsistent with this order, are not well taken and are, hereby, overruled. It is, further

ORDERED, That the reply of protestant Bryan to the exceptions of both Husman and Duff, which exceptions were filed January 4, 1972, to the extent that it is incon-

sistent with this order is not well taken and is hereby overruled. It is, further

ORDERED, That the petition to reopen filed by Husman, December 28, 1971, and the petition to reopen filed by Duff, December 30, 1971, are rendered moot by the provisions of this order and are therefore overruled. It is, further

ORDERED, That the reply of protestant Bryan to the petitions to reopen of Husman and Duff, which reply was filed January 4, 1972, is rendered moot by our disposition of said petitions and is, therefore, overruled. It is, further

ORDERED, That a period of sixty (60) days from the date of this order, be, and hereby is, given the protestant, Bryan Truck Lines, Inc., within which to improve its presently authorized service to the extent found necessary as set forth herein. At the end of this sixty (60) day period, a compliance test period shall begin and shall continue through December 31, 1973. After December 31, 1973, but not later than January 4, 1974, protestant shall file with this Commission a report of compliance with the provisions of Conclusion of Law (9). Protestant shall serve a copy of this report of compliance upon each applicant and upon each attorney for each applicant. It is, further

ORDERED, That in the event that a report of compliance is filed by Bryan Truck Lines, Inc., a public hearing shall be promptly assigned thereon, said hearing to be held not less than twenty-one (21) days or within such additional time as the Commission orders, after the expiration of the instant order, provided, however, that all parties have had at least ten (10) days notice of such hearing. It is, further

ORDERED, That if the testimony at said public hear-

ing on compliance shall show that protestant Bryan has improved its service in strict compliance with the particulars set forth in subparagraph (9) of the Conclusions of Law, supra, this will be sufficient to show that the public convenience and necessity herein found to exist has been fully satisfied, and the within application shall be denied; otherwise, the applications shall be granted. It is, further

ORDERED, That, in the event no compliance report is filed by Bryan Truck Lines, Inc., the within applications will be granted for the transportation of property from and to Bryan, Ohio, RESTRICTED against the transportation of household goods, office furniture and fixtures, commodities usually handled in dump trucks and unloaded by dumping, and commodities which, by reason of size or weight, require special equipment to load or unload. It is, further

ORDERED, That copies of this order be served, forthwith, on each of the applicants herein and on the protestant Bryan Truck Lines, Inc. It is, further

ORDERED, That the jurisdiction of this matter be, and the same hereby is, retained by the Commission for all proper purposes.

## APPENDIX C

MOHAWK MOTOR, INC., Appellant,

v.

PUBLIC UTILITIES COMMISSION
of Ohio et al., Appellees.

**No. 40414.**

**SUPREME COURT OF OHIO.**

July 26, 1967.

*Syllabus By The Court*

When a common carrier enaged in the business of transporting property by motor vehicle in Ohio files an application with the Public Utilities Commission of Ohio for an irregular route certificate of public convenience and necessity, the applicant assumes (1) the burden of proof that there is a public need for such service, and (2) that, if the certificate is issued, any deficiency in service to the public will be corrected. A failure by applicant to meet this burden of proof, in either instance, requires the denial of such application.

On February 1, 1965, Husman Express Company filed an application with the Public Utilities Commission (hereinafter referred to as commission or appellee) for a certificate of public convenience and necessity to transport property as a motor transportation company over irregular routes from and to Bryan, Ohio. It already held certificated authority to operate over irregular routes to and from Cincinnati. Mohawk Motors, Inc. (hereinafter referred to as Mohawk or appellant), held a certificate of convenience and necessity to transport

property over irregular routes from and to Bryan, Ohio. Both Husman and Mohawk held certificates to operate over regular routes.

The application was referred to an attorney-examiner to hold hearings and report his findings and recommendations to the commission.

On September 28, 1965, the examiner filed his report, finding a deficiency in transportation service to and from Bryan, Ohio, recommended the issuance of a 60-day order pursuant to the provisions of Section 4921.12 of the Revised Code, and, unless such transportation deficiency be corrected within the 60-day period, then the application of Husman should be allowed.

Mohawk objected and took exception to the report of the examiner. The commission overruled the objections and exceptions of Mohawk and adopted the report of the examiner as if fully rewritten in its opinion and order.

It is advisable, before proceeding further, to consider the evidentiary situation disclosed by the record.

It is not deemed necessary to review the mass of testimony and exhibits to determine if the issuance of the certificate requested is manifestly against the weight of the evidence, but rather to determine if upon the undisputed evidence, as a matter of law, the allowance of the certificate of public convenience and necessity to transport property over irregular routes to and from Bryan would be unreasonable and unlawful.

A shipment (less than a total load) would arrive in Cincinnati in the morning. The bulk shipment would be broken open and the property distributed at the Cincinnati terminal for shipment to various parts of Ohio the next day. Husman emphasized that *overnight delivery* would be confined to an area within 100 miles of Cincinnati. He described the operating procedure as follows:

"* * * Freight is picked up, or rather the freight is delivered to Cincinnati *in the morning*, the inbound freight. *Afternoon* is spent accumulating the out-bound

traffic destined to various points in Ohio, and is brought into the terminal around 6:00-7:00 o'clock in the evening, and then is redistributed into runs as the case may be. And the runs are determined after the freight arrives, and we know where we are going. These runs are scheduled out, depending on the length of run, the leaving times, and all runs are scheduled to hit their points of destination at 7:00 o'clock the following morning for distribution of the freight in these areas, and by the agents previously mentioned in the cities, where we are agencies * * *." (Emphasis added.)

It appears clear that property, less than a total load, is placed on board *at Bryan* in the evening. The load is then taken to Cincinnati *arriving there in the morning.* During the day it is broken up into lots and distributed in the terminal for shipment that evening on its way to its destination. Bryan does not receive overnight service, but second-day service within 100 miles of Cincinnati. Outbound shipments from Bryan cannot be delivered to an area within 100 miles of Cincinnati in less than two nights and part of the next day.

Of the large number of shippers in Bryan, two appeared and testified on behalf of the applicant. These two had used Husman Express for a number of years. There were two other shippers at Bryan who had used Husman but these two did not testify.

The two shippers who did testify, according to the examiner's review, testified:

"* * * as to the need of their companies for *direct overnight service* to points and places throughout the state of Ohio in order to meet competition." (Emphasis added.)

The commission overruled appellant's objections and exceptions to the examiner's report as well as appellant's motion for a rehearing, and entered its final order on May 18, 1966. Mohawk perfected its appeal to this court as a matter of right.

Taylor C. Burneson, Columbus, for appellant.

William B. Saxbe, Atty. Gen., J. Philip Redick and Langdon D. Bell, Columbus, for appellee Public Utilities Commission.

George, Greek, King & McMahon, Paul F. Beery and David L. Pemberton, Columbus, for appellee Husman Express Co.

HERBERT, Judge.

There appears to be a material variance between the transportation service to be rendered as stated in the application, to wit, to and from Bryan, whereas Husman limits the service to delivery, first to Cincinnati, and then to other points.

It seems further to be undisputed that shippers out of Bryan may receive *overnight service out of Cincinnati* but not out of Bryan, and such service is limited to places and points within 100 miles from Cincinnati.

Many practical problems may arise under the limitations imposed by Husman. For example, Toledo is approximately 67 miles from Bryan. But a Bryan shipper, in order to secure a shipment of property to Toledo, under the proposed certificate, is required to ship his property over 200 miles south to Cincinnati, where it lays over until the next day. It is then shipped north over 200 miles to Toledo when it again lays over the next day before delivery. By going a direct route from Bryan to Toledo the shipper could secure delivery in one day or "direct overnight service."

From Bryan to Cleveland is approximately 145 miles. A Bryan manufacturer, shipping to Cleveland and the industrial northeast, would certainly be loathe to see his shipment going south 200 miles, there to lay over one night, before starting for its final destination in the northeast. He would, without doubt, conclude that such a circuitous and delaying route would not be in the public interest.

It is strange that neither the examiner, in his long report, nor the commission, in its opinion, did not make any reference or mention of the requirement fixed by Husman that if the certificate should issue all outbound traffic from Bryan would be required to go south to Cincinnati, some 200 miles, before it could be shipped to its destination.

It is further strange that neither the examiner nor the commission made any reference that the overnight service would be confined to points and places within 100 miles of Cincinnati, and further that such overnight service *would not be out of Bryan but would be out of Cincinnati.*

Husman may have recognized that there was no public need for the requested certificate but only that it would take some dollars out of certain carriers' treasury and put them in the treasury of other carriers, as disclosed by the record in Husman's testimony as follows:

"Q. Well, now, your company has authority to transport freight from Bryan to Cincinnati zone and return, so that type of authority, if granted in this case, *would be duplicative* of what your company already has, would it not? A. That's right.

"* * *

"Q. * * * Now, you said the granting of this would be an advantage, economically, to your company. I assume then that you mean you would pick up a few more dollars? A. Few more dollars.

"Q. And at the same time you would be taking those dollars away from other carriers now handling the traffic, wouldn't you? A. Well, I don't—I would be taking it away from some one, of course.

"Q. That is what I mean. Somebody would lose what you gain? A. That's right." (Emphasis added.)

The commission, in its opinion, endeavors to point out deficiencies in the present authority stating:

"That existing transportation service of certificated carriers authorized to transport property from and to Bryan, Ohio, is deficient *in that it does not offer to the shipping public efficient, direct, next-day service for the transportation of property,* including less-than-truckload traffic, from Bryan, Ohio, to points and places in the state of Ohio, and from points and places in the state of Ohio to Bryan, Ohio." (Emphasis added.)

If there is such a deficiency, which the record fails to disclose with clarity, the proposed certificate would not, in any way, correct such deficiency. It is conceded that the proposed certificate does not offer direct service but rather under Husman's direction all traffic would be diverted south from Bryan away from any direct course to the east or northeast. Husman admits that there would be no next-day service out of Bryan but that the only next-day service would be out of Cincinnati. Consequently, it follows that the granting of the certificate would not, in anyway, provide any improvement over the present method of transportation of property so far as the public interest is served.

One of the two public witnesses who testified was a Morris Snyder, traffic manager of Arro Corporation, which employs approximately 1,087 people. In discussing the distribution of the products of his company, he said, according to the review by the examiner, that:

"This distribution is primarily through jobbers who request that direct shipment be made to their customers. These customers may be located *at any crossroads in the state of Ohio where a gas station exists.*" (Emphasis added.)

It would hardly be possible or to the public interest to

provide "direct next-day service for" motor transportation to every crossroads in Ohio.

The remaining witness for the applicant testified that he "believes that his company is entitled to expect direct carrier service to *most* points in the state of Ohio."

Requiring that all shipments out of Bryan go directly south to the Ohio River would hardly be direct service to the north and to the east.

[1] In the case of D. G. & U. Truck Lines, Inc., et al., v. Public Utilities Commission, 158 Ohio St. 564, 573, 110 N.E. 2d 587, 592, it was stated in the opinion of Judge Matthias that:

"* * * Such convenience and necessity must be shown by evidence adduced, the burden of which is upon the applicant for such certificate."

In Mohawk Motor, Inc., v. Public Utilities Commission, 159 Ohio St. 77, at page 80, 110 N.E. 2d 909, 911, Judge Middleton stated that:

"* * * the burden of proving such public need is upon the applicant for the certificate."

A very pertinent suggestion is stated by the late Chief Justice Marshall in the case of New York Central Rd. Co. v. Public Utilities Commission, 115 Ohio St. 493, at page 497, 154 N.E. 797, 798, that, when there is a showing of need, there must "* * * also be a showing of ability on the part of the applicant to supply that need adequately."

[2] From a consideration of the entire record it appears doubtful that there is a deficiency in present transportation service. If any such deficiency can be claimed it is abundantly clear that the proposed certificate will not, in any way, correct any such deficiency but will largely duplicate service already established and in use, and, at the same time, will fail to provide overnight transportation service to and from Bryan, Ohio.

It follows that the order of the Public Utilities Com-

mission is unreasonable and contrary to law, and such order of the commission is, therefore, reversed.

Order reversed.

TAFT, C. J., and ZIMMERMAN, MATTHIAS, O'NEILL, SCHNEIDER and PAUL W. BROWN, J.J., concur.

## APPENDIX D

**Before**

## THE PUBLIC UTILITIES COMMISSION OF OHIO

**No. 32,949**

**OPINION and ORDER**

May 18, 1966

In the Matter of the Application of HUSMAN EXPRESS CO., 11755 U.S. Highway 42, Cincinnati, Ohio 45241, for a Certificate of Public Convenience and Necessity.

This day after full hearing, due notice of the time and place of which was given to all parties in interest, by publication and otherwise as provided by law, this matter came on for consideration upon the application, as amended at the time of the hearing, of Husman Express Co. for a certificate of public convenience and necessity to establish, maintain and operate a motor transportation company to furnish the following service, on call of the public, upon and over irregular routes:

> Transportation of property from and to Bryan, Ohio. RESTRICTED against the transportation of household goods, furnishings and fixtures. RESTRICTED against the transportation of property requiring the use of low heavy-duty trailers.

the protests thereto; the report and recommendation of Attorney Examiner Marvin C. Miller, filed September 28, 1965; the exceptions to said report filed by protestants Bryan Truck Line, Inc. and Mohawk Motor, Inc.; the reply of applicant to said exceptions; and the testimony and exhibits offered and introduced in evidence upon said hearing.

In compliance with Section 4903.09 of the Revised Code, the Commission hereby renders the following opinion:

**OPINION**

The applicant herein seeks authority to transport property from and to Bryan, Ohio, subject to various restrictions. Both of the protestants herein possess irregular certificates authorizing the transportation of property from and to Bryan, Ohio. Neither of the protestants have actively solicited or advertised that they possess authority to conduct an irregular freight transportation service from and to Bryan, Ohio.

The record establishes a need for direct carrier service from and to Bryan, Ohio. Direct carrier service means one carrier transporting the shipment from origin point to destination point. The instant record establishes the fact that neither of the protestants are actively operating under the full extent of their irregular certificated authority.

The fact that the Bryan, Ohio, shippers are predominately small LTL shippers should not penalize these shippers and prevent them from receiving the same quality and character of transportation service demanded and received by larger truckload shippers. The small shippers of Bryan, Ohio, constitute the shipping public of that area and as such are entitled to transportation service commensurate with its shipping needs. The subject shipping public has a need for direct service with next day delivery from Bryan, Ohio, to points and places in the State of Ohio, and from points and places in the State of Ohio to Bryan, Ohio.

The Commission concurs in the report of the attorney examiner filed September 28, 1965, and hereby adopts the same as if fully rewritten herein with the exception of the list of carriers entitled to receive the statutory sixty-day notice as set forth in the report of the said

examiner, which list the Commission herein revises.

## ULTIMATE FINDINGS

*The Commission*, being fully advised in the premises, now finds:

That a present public need exists in Bryan, Ohio, for the transportation of property, specifically including LTL shipments, in suitable equipment providing an efficient transportation service with a minimum of vehicles using the public highways;

That existing transportation service of certificated carriers authorized to transport property from and to Bryan, Ohio, is deficient in that it does not offer to the shipping public efficient, direct, next day service for the transportation of property, including less-than-truckload traffic, from Bryan, Ohio, to points and places in the State of Ohio, and from points and places in the State of Ohio to Bryan, Ohio;

That public convenience and necessity exists for the granting of authority for the transportation of property from and to Bryan, Ohio, subject to restrictions as hereinbefore set forth; and

That under the provisions of Section 4921.12 of the Revised Code, the following certificated carriers should be given a period of sixty days in which to improve their service to meet the needs of the shipping public in Bryan, Ohio, said services to be improved as hereinafter set forth:

W. E. Best, Inc.
P.O. Box 445
Pioneer, Ohio 43554
Cert. No. 9300-I

Bryan Truck Line, Inc.
P.O. Box 227
620 East Wilson Street
Bryan, Ohio 43506
Cert. No. 2141-I

F. J. Egner & Sons, Inc.
3969 Congress Parkway
P.O. Box 216
West Richfield, Ohio 44286
Cert. No. 7375-I

John Kauser Trucking Service, Inc.
850 West Harrison Street
Paulding, Ohio 45879
Cert. No. 7444-I

B. A. Miller & Sons
Trucking, Inc.
East Main Street
Liberty Center, Ohio 43532
Cert. No. 10324-I

Mohawk Motor, Inc.
40 Harrison Street
Tiffin, Ohio 44883
Cert. No. 2206-I

Motor Service Company, Inc.
235 South Fifth Street
Coshocton, Ohio 43812
Cert. No. 9590-I

National Trailer Convoy, Inc.
P.O. Box 8096, Dawson Station
1925 National Plaza
Tulsa, Oklahoma 74151
Cert. No. 8021-I

(a) Adequately publicize in media reaching the general shipping public in Bryan, Ohio, that they possess authority from this Commission and the ability to transport property to the full extent of their authority in suitable equipment.
(b) Have available suitable equipment for the transportation of property, including less-than-truckload shipments, in a number sufficient to transport the shipping traffic originating or generating from Bryan, Ohio, to points and

places in the State of Ohio and from points and places in the State of Ohio to Bryan, Ohio.

(c) Provide to the shipping public of Bryan, Ohio, a direct next day transportation service for property, including less-than-truckload shipments, from Bryan, Ohio, to points and places in the State of Ohio and from points and places in the State of Ohio to Bryan, Ohio.

(d) Implement whatever further changes in operating procedure, equipment and/or personnel, as are required, in the exercise of sound managerial discretion, in order to correct such service deficiency presently existing in Bryan, Ohio, and further to effectuate whatever changes are required to insure the general shipping public of Bryan, Ohio, in securing the transportation service which is adequate to meet and fulfill its shipping needs, and to insure the said shipping public that they are capable of securing and providing additional suitable equipment to meet the continuing shipping needs of the general shipping public of Bryan, Ohio.

The Commission further finds:

That the exceptions of protestants to the report of the attorney examiner, filed September 28, 1965, are not well made and should be overruled.

## ORDER

It is, therefore

ORDERED, That the exceptions of protestants to the report of the attorney examiner be, and hereby the same are, overruled. It is, further

ORDERED, That a period of sixty days from the date of this order be, and hereby is, given the within listed motor transportation companies within which to improve their presently authorized service to the extent herein found necessary to meet the public convenience and necessity, and a period of five days thereafter within which to report to this Commission thereupon, serving a

copy of said report on applicant, also on applicant's counsel—Mr. Paul F. Berry, 100 East Broad, Columbus, Ohio 43215; It is, further

ORDERED, That in the event said reports of compliance are filed by any, or all, of the within named motor transportation companies, public hearing shall be promptly assigned thereon, said hearing to be held not less than twenty-one (21) days, or within such additional time as the Commission orders, after the expiration of the instant order; provided, however, that all parties have had at least ten (10) days' notice of such hearing. It is, further

ORDERED, That if the testimony at said public hearing on compliance shall show that the public convenience and necessity herein found to exist, with respect to the service which they are authorized to furnish under their respective certificates, has been fully satisfied, the within application shall be denied in this respect. In the event such testimony shall show that public convenience and necessity herein found to exist has been satisfied only in part, the Commission shall forthwith issue its finding and order limiting the authority to be granted to this applicant to that authority required to satisfy the continuing public need. It is, further

ORDERED, That a copy of this order be forthwith dispatched to the applicant herein and to the within listed motor transportation companies. It is, further

ORDERED, That jurisdiction of this matter be, and hereby the same is, retained by the Commission for all proper purposes.

THE PUBLIC UTILITIES COMMISSION OF OHIO

## APPENDIX E

**No. 73-777**

**IN THE SUPREME COURT OF OHIO**

**Appeal from The Public Utilities Commission of Ohio**

BRYAN TRUCK LINES, INC.,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO,
Appellee.

**MOTION OF INTERVENING APPELLEE, HUSMAN EXPRESS CO., FOR REHEARING**

Now comes Husman Express Co., Cincinnati, Ohio, Intervening Appellee, and moves the Court for a rehearing of the Order of the Supreme Court of Ohio dated April 24, 1974, for the following reasons.

**STATEMENT OF THE CASE**

Husman Express Co. filed an application with The Public Utilities Commission of Ohio for a Certificate of Public Convenience and Necessity to transport property over irregular routes from and to Bryan, Ohio, subject to certain restrictions. There was a related application filed by Duff Truck Line, Inc.

The Supreme Court of Ohio held, in its Order of April 24, 1974, as follows:

> "Motor transportation companies—Public Utilities Commission — Application for irregular route certificate — Burden of proof on applicant — To show public need — That granting application will cor-

rect deficiency in existing service-R.C. 4921.10 — Order of commission granting application — Unreasonable and unlawful, when."

The Court thereafter reversed the Order of The Public Utilities Commission of Ohio and found that it was "unreasonable and unlawful".

The Court's decision is based upon a finding that Husman Express Co. did not establish how it intended to provide direct, overnight service. In fact the Court found that the record was "totally devoid" of any such evidence. It is this finding which is erroneous.

## SUMMARY OF THE EVIDENCE

### A. HUSMAN EXPRESS CO.

Husman Express Co. or its predecessor, initiated service in 1861 and has continued to expand its services since then so that it presently operates in interstate and intra state commerce under its irregular certificate authorizing transportation from and to Cincinnati, Ohio (R. 131,135). It is predominately a carrier providing service for less-than-truckload shipments (R.135). In providing this LTL service HUSMAN has terminals at Dayton, Youngstown, Springfield, Columbus, and Cincinnati, Ohio (A. 135). It also uses cartage agents at Toledo, Bryan, and Lima for similar distribution of LTL shipments (R.136-137). The Cincinnati facility is a fifteen (15) door terminal and all LTL shipments move through this terminal (R. 139). At all of these various terminals or agent stations, HUSMAN has various amounts of equipment stationed to facilitate the distribution and pick-up of LTL shipments (R.139). In providing this LTL service the applicant operates thirty-three (33) tractors, twelve (12) straight trucks, two (2) automobiles, and seventy-three (73)

trailers (HUSMAN Exhibit B, R.37).

HUSMAN'S method of operation and ability to perform the desired service was adequately discussed by Mr. Husman in conjunction with HUSMAN'S Exhibit D when he testified as follows:

"Q. Sir, do you have in front of you a copy of Applicant Husman Exhibit D?

A. Yes.

Q. Looking at the first carbon and the first — well, excuse me. Let me ask you this; from what was Exhibit D prepared?

A. This was prepared from actual runs on the — this is shipped February 2, 1970, the out-bound runs that night as well as the inbound runs from Bryan that evening.

They came into Cincinnati.

Q. Was February 2 a typical day for Husman or was there anything special?

A. It was fairly — the runs are sample.

It is indicated I think 12 Husman runs that day and one load in from Bryan here but there may have been other loads — I don't know — in-bound.

Q. Who actually prepared the list?

A. My son, Richard.

Q. Is he here in this hearing today?

A. Yes, he is here, yes.

Q. Now, to the best of your knowledge would you consider that February 2 would be a typical day as far as Husman?

A. That would be typical.

Q. Looking at the first line which says Trailer 141, would you explain what you are showing on that first line?

A. Trailer 141 left Bryan, Ohio, that day loaded with

interstate freight and they have added intra state on it again for delivery in Cincinnati.

The arrival time — it left at 3:00 p.m. and arrived at Cincinnati at 7:30 p.m. on February 2nd.

Q. So it left Bryan you are talking about; you left this Bryan Cartage Company here?

A. Yes, it left the terminal here at 3:00 p.m. and arrived in Cincinnati 7:30.

Q. Fine.

A. That same night we loaded out trailer 107, 41, 149, 111, 70, 121, 122, 118, 92, 75, and the light trailer there 69.

Q. Very good. Now, let's go back to this trailer that came in.

A. Sure.

Q. A load ordinarily would have intra state freight on it, is that right?

A. This was only interstate.

Q. What would you do with the interstate?

A. That would be distributed in Cincinnati the next morning to various carriers and moved into interstate traffic.

Q. Could some of that freight for example be going back to Chicago to interstate freight?

A. It could be.

Q. Could be going to Pittsburgh?

A. Could be going to Pittsburgh.

Q. You actually have some interstate where you went Chicago to Cincinnati and then back to Chicago?

A. It comes to us in big loads.

Q. Now, on this you show a trailer and then one through twelve; what are you showing us by that?

A. We are indicating a trailer loading time and quantity of freight and the time it left the terminal.

Q. Why?

A. To indicate that freight of an Ohio intrastate nature could have made any of these runs with two exceptions and been delivered the next day actually in Ohio.

Q. Let's take example one; that's a trailer I assume that you are loading at Dayton, is that correct?

A. That's right.

Q. It left Cincinnati at what time?

A. 10.00 a.m.; should be 10·00 p.m.

Q. It was what, 50 percent loaded?

A. It was 50 percent loaded.

Q. And let's assume that you would have received some freight from a Bryan shipper destined to Dayton; what would you have done to the freight now?

A. Well, we would have put it in this trailer and moved it into Dayton that same night.

Q. Would have gone from Bryan to Dayton on the first trailer we are talking about?

A. Yes.

Q. Would it have gone from Bryan to Cincinnati on the first trailer?

A. It would not.

Q. Handled out of the truck?

A. Handled out of the truck and back in Cincinnati in next day traffic.

Q. Your second trailer here went to what areas?

A. This one went to Akron and Youngstown, Ohio.

Q. Now, do you normally serve Youngstown, Ohio which is clear in the Northeastern corner of Ohio?

A. Yes, we do. Every day we have a load going into Youngstown.

Q. I see. Your third trailer shows going to where, Urbana and Columbus?

A. Yes, Urbana. It left 7:00 a.m. that morning.

Q. Is this unusual or is this typical?

A. No, the runs are planned. On these sheets the terminal times running to are planned to get the driver into the area for deliveries at the time the store begin their day of operation.

Q. Okay; let me ask you this then.

You have these twelve runs listed here, the terminal activity areas listed.

Is there a notice posted for the runs or would you tell me how these runs are handled as far as you are concerned?

A. These are our normal runs. These happen every day.

They may not be the same town but they move out in the same general areas.

Q. How do you vary it from day to day?

A. The course of freight and where it is going, just where the runs are going.

Q. For you to serve the Bryan shippers into these areas would you have to create any additional terminals?

A. No.

Q. Would you have to buy any additional equipment?

A. I see no reason for it, sir.

If we do we certainly could do it.

Q. Would you have to put on any additional employees?

A. No, no; our dock force could handle this very nicely.

I say following the moves now I don't see any reason for additional help.

In fact, we need additional help here.

Q. How many trailers do you have here, sir?

A. Sir?

Q. How many trailers do you have in Bryan now?

A. Five.

Q. Are those being used to their full capacity?

A. Oh, no; at the present time, no.

Q. And you think it would be economically beneficial to the company to handle freight in the manner you have described?

A. Well, I thoroughly believe it would, yes.

Q. Now, is this way you are handling freight unusual as far as your company or other trucking companies handle freight in this manner?

A. It's common practice among Chicago daily highway roadway express in the sense of what they call break bulk trucks which means exactly what I am doing on a truck load basis.

They move their vehicles into the terminals, unload them and reload them to various destinations from their Chicago terminal and as I say, we had the idea of doing it with less truck loads.

Q. And how long have been doing this?

A. Oh, this has been common practice during the history of our business.

Q. And it has been profitable?

A. Been profitable." (R.140-146)

---

"Q. I have one; as far as Bryan, Ohio, the shippers here, do you have a Bryan facility that you use to pick up?

A. Yes, we have the cartage company here in Bryan to handle pick-up and delivery work.

EXAMINER ZUBER: Do you lease terminal space?

A. Yes, we do.

MR. BEERY: So they are here serving your company daily?

A. Yes, they are here as a part of our operation only they are not on our property in this case.

BY MR. BEERY:

Q. Now, how often do you have a trailer going from Bryan to Cincinnati? On your Exhibit D, for example, you show the time in transit. How long does that run take?

A. At least one a day; there is at least one and sometimes there is 7-8 trailers.

Q. And how long has that been 7-8; how many years?

A. This has been going on as the Art Company has grown. Used to be one every other day, one every day, nor it has developed in these proportions that we have this service we render back and forth.

Q. So it has been at least a year, year and a half?

A. Oh, it's been 4-5 years.

Q. So you would have no difficulty with a $6.00 load?

A. No, none at all" (R.158-159)

Also attached as Apendix A is Husman's Exhibit D which was submitted to the Court as "Additional Record".

## ARGUMENT

The finding by the Supreme Court of Ohio that the record is ". . . totally devoid of any evidence that either applicant would, if its application for a certificate were granted, provide the overnight service" is arbitrary and therefore in violation of the Due Course of Law provisions of the Ohio Constitution, Article I, Section 16, and the Due Process *Clause in the 14th Amendment of the United States Constitution.*

On the last page, second paragraph, of the per curiam opinion in this case, the Court states:

> "An applicant for an irregular route certificate of public convenience and necessity to transport property from and to a specific location assumes the burden of proving not only that there is a need for such service, but also that the granting of the application will correct any deficiency in the service provided the public by an existing certificate holder." *Mohawk Motor v. Pub. Util. Comm.* (1967), 11 Ohio St. 2d 238, 228 N.E. 2d 611.

Husman Express Co., Intervening Appellee, agrees with this general statement of law but strongly disagrees with the manner in which the Court has applied it in the instant case.

Husman Express Co. contended in its brief, and still contends, that the record clearly demonstrates there is a need for overnight, less-than-truckload service from and to Bryan, Ohio. The Court apparently agrees since on the last page of its Opinion, third paragraph, it stated:

> "The record in the present case discloses that there is a need for prompt, less-than-truckload freight service from and to Bryan, Ohio."

Thus, the sole ground for the Court's reversal of the Order of The Public Utilities Commission of Ohio, which granted the Certificate of Public Convenience and Necessity to the Intervening Appellee, is the erroneous Court conclusion that the record did not establish that granting the application would correct the existing deficiencies in service. This may be reasonably inferred from the last paragraph of the Court's Opinion:

> "Assuming that there is sufficient evidence in the record to support the commission's finding of a need for overnight, less-than-truckload service from and to Bryan, Ohio the record is *totally devoid* of any evidence that either applicant would, if its application for a certificate were granted, provide the over-

night service. The order of the commission is unreasonable and unlawful, and is, therefore, reversed." (Emphasis added)

Intervening Appellee strongly disagrees with the Court when it states that the record is "totally devoid" of any evidence that Intervening Appellee would provide the overnight service which is needed. In its appeal brief, beginning at page 29, Husmas Express Co. clearly pointed out the various places in the record in which evidence of the carrier's ability to provide overnight, less-than-truckload service could be found. Furthermore, beginning at page 3 of said brief, Intervening Appellee summarized the relevant evidence of the transcript relating to its ability to provide the service in question and even set forth, verbatim, those portions of the record which demonstrated its method of operation and its willingness and ability to perform, (pp. 140-145, 154-155 of transcript). The testimony contained in said portion of the record explains the meaning of Husman's Exhibit D, which was separately submitted to the Court as "ADDITIONAL RECORD OF INTERVENING APPELLEE, HUSMAN EXPRESS CO.". The evidence of record not only explained the proposed method of operation of Husman Express Co. but also the economic aspects of the proposed service.

From said evidence in the record, it is demonstrated that a typical less-than-truckload shipment is dispatched from Bryan, Ohio at approximately 3:00 p. m. and would arrive in Cincinnati, Ohio at 7:30 p.m. on the same day. These shipments would then be consolidated with other less-than-truckload shipments destined to points in Ohio. The consolidated less-than-truckload shipments would then leave Cincinnati, Ohio between 3:00 a.m. and 7:00 a.m. the following morning and arrive at the closest des-

tination terminal in time "to get the driver into the area for deliveries at the time the stores begin their day of operation." (R. 143). At the destination terminal the less-than-truckload shipments are placed on delivery trucks and delivered to their final destination. Please note these shipments are delivered the day after they are picked up at their origin point and therefore the service provided is "*overnight*". This overnight service which Husman now provides to points in Ohio would be provided to the shippers at Bryan, Ohio if the Certificate of Public Convenience and Necessity is granted.

This method of consolidation of less-than-truckload shipments is necessary to economically perform the required transportation. All motor carriers performing less-than-truckload service consolidate less-than-truckload shipments in some similar manner. It is not economically feasible to handle the shipments unless there is such consolidation. By consolidating the less-than-truckload shipments the revenue earned by a particular tractor-trailer unit is increased many times. Obviously, if you have a hundred shipments on a particular trailer and receive Ten Dollars for each shipment the tractor-trailer unit will earn One Thousand Dollars. It costs about Fifty Cents a mile to operate such unit, and therefore the consolidation is necessary so that revenue will at least equal the cost of operation.

A motor carrier cannot handle a single less-than-truckload shipment economically from point of origin to destination without consolidating it with other shipments. For example, if a motor carrier attempted to transport a single less-than-truckload shipment wherein the charge is approximately Ten Dollars from Bryan, Ohio to Dayton, Ohio it would lose considerable money. The distance between Bryan and Dayton is approximately 140 miles,

and assuming an operating cost of Fifty Cents a mile, then the cost of the operation would be Seventy Dollars one way. On that individual shipment the motor carrier would lose approximately Sixty Dollars. Additionally, it also may incur a substantial loss on the return trip unless it has consolidated several shipments coming back.

Intervening Appellee contends that, in view of the above evidence which is in the record, the finding of the Court, in the last paragraph of its per curiam opinion in the instant case, that the record is ". . . totally devoid of any evidence that either applicant would, if its application for a certificate were granted, provide the overnight service" is arbitrary and capricious and therefore in violation of the Due Course of Law provision of the Ohio Constitution, Article I, Section 16, and the Due Process Clause of the 14th Amendment of the United States Constitution.

The Supreme Court of Ohio has many times considered the constitutionality of legislation with regard to its possible contravention of the Due Process Clause:

> ". . . [I]t is very obvious that everything that takes the form of an enactment is not therefore to be deemed the law of the land, or due course or process of law. If this were so, then decrees and forfeitures in all possible forms, and acts confiscating the property of one person or class of persons, or a particular description of property, upon some view of public policy, where it could not be said to be taken for a public use, would be the law of the land. *Salt Creek Valley Turnpike Co. v. Parks*, 50 Ohio St. 568, 579, 35 N.E. 304 (1893).

The constitutional requirement of Due Process of Law applies with equal force and vigor to the judicial branch of the government:

> "The individual has as much right to have the legislative branch of the sovereignty express its will by the constitution or traditional method as he has to have the judicial arm proceed in *only such ways as the settled maxims of law permit.*" (Emphasis added). *State, ex rel., Graham v. Bates*, 2 Ohio Op. 70, 73, 5 Ohio Supp. 46 (1935).

The Supreme Court of Ohio has looked to the United States Supreme Court for a definition of "Due Process":

> "Due process in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction and under such safeguards for the protection of the individual's rights as those maxims prescribe for the class of cases to which the one in question belongs. *State, ex rel., Graham v. Bates*, supra, at 72.

The Due Course of Law provision of the Ohio Constitution has been considered equivalent to the Due Process of Law Clause in the 14th Amendment to the United States Constitution. *Direct Plumbing Supply Co. v. Dayton*, 138 Ohio St. 540, 38 N.E. 2d 70 (1941).

The fact that the requirements of procedural due process have been satisfied in the instant case, does not mean that the requirements of substantive due process have been met:

> "When government perverts its purpose and acts arbitrarily, unreasonably or intolerantly, or in any way for private purposes, such conduct is not due process of law, and the individual whose rights are abridged has constitutional basis for complaint against such action. *State, ex rel., Schneider v. Gulatt Cleaning* N *Laundry Co.*, 32 Ohio N.P. (n.s.) 121, 127 (1934).

In conclusion, Intervening Appellee contends that the Supreme Court of Ohio has apparently overlooked the evidence in the record which demonstrates Husman Ex-

press Co.'s willingness and ability to perform the needed overnight service. Consequently, the Court's finding that the record is "totally devoid" of such evidence, coupled with the fact that such finding is the sole basis for reversing the Order of The Public Utilities Commission of Ohio, contravenes the Due Course of Law provision in Article I, Section 16 of the Ohio Constitution and the Due Process Clause in the 14th Amendment of the United States Constitution.

Respectfully submitted,
PAUL F. BEERY

## HUSMAN EXPRESS COMPANY

## EXHIBIT D

EXAMPLE #1
Bryan Proposal Operation
Trailer #141 Left Bryan 3:00 P.M. Feb. 2, 1970—Arrived Cinti., Ohio 7:30 P.M. Feb. 2, 1970.
Trailer Loading from Cincinnati to Various Cities in Ohio were:
107A, 41A, 149A, 111A, 70A, 121A, 118A, 92A, 75A, X1841, 69A.

#1
Trailer #69A, Loading for Dayton direct
Departure from Cinti. 10 A.M. Feb. 3 50% Loaded

#2
Tailed 107A Loading for West Austintown, Akron, and Youngstown.
Departure from Cinti. 3 A.M. Feb. 3 95% Loaded.

#3
Trailer #149A Loading for Urbana and Columbus
Departure from Cinti. 7 A.M. Feb. 3 95% Loaded.

#4
Trailer #121A Loading for Zanesville, Yorkville, East Liverpool and Youngstown
Departure 4:30 A.M. Feb. 3 95% Loaded

#5
Trailer #92A Loading Dayton direct
Departure 5 A.M. Feb. 3 50% Loaded

#6
Trailer #111A Loading for Medway, Troy, Piqua, Oran, Celina, Lima, Tiffin, and Toledo
Departure 6 A.M. Feb. 3 75% Loaded

#7
Trailer #70 Loading for Xenia, Centersville, West Carrollton, Middletown, and Hamilton
Departure 6:30 A.M. Feb. 3 50% Loaded

#8
Trailer #75 Loading for Columbus direct
Departure 4:30 A.M. Feb. 3 75% Loaded

#9
Trailer #41A Loading for Lebanon, Cedarville, Springfield,
Departure 6 A.M. Feb. 3 50% Loaded

#10
Trailer #118A Loading for Dayton Direct
Departure 4 A.M. Feb. 3 50% Loaded

#11 (*)
Trailer #122A Loading for Dayton Direct
Departure 1 A.M. Feb. 3 50% Loaded

#12 (*)
Trailer #184A Loading Dayton Direct
Departure 10 P.M. Feb. 2 50% Loaded

---

(*) These are the only 2 trailers which departed early. The units arriving from Bryan may have not been worked to meet these departures.

## APPENDIX F

## THE SUPREME COURT OF THE STATE OF OHIO

*THE STATE OF OHIO,*
*City of Columbus.*

1974 TERM

Bryan Truck Line, Inc.,
Appellant,

To wit: June 6, 1974

No. 73-777

*vs.*

**REHEARING**

Public Utilities Commission of Ohio,
Appellee;

Duff Truck Line, Inc., et al.,
Intervening-Appellees.

*It is ordered by the court that rehearing in this case is denied.*

I, Thomas L. Startzman, Clerk of the Supreme Court of the State of Ohio, do hereby certify that the foregoing entry was correctly copied from the records of said Court, to wit, from Journal No._____ Page_____.

In Witness Whereof, I have hereunto subscribed my name and affixed the seal of the Supreme Court this **6th day of June 1974.**

THOMAS L. STARTZMAN, *Clerk.*

## APPENDIX G

## PUBLIC UTILITIES COMMISSION OF OHIO

## TRANSCRIPT

(Page 148)

Q. Would you look at the Exhibit the gentleman from Ohio Art Company submitted; I believe it is identified as Exhibit 3 and in column two of that Exhibit he listed a number of points which he characterized as being points where there was no dependable direct LTL service.

Some comment was made about the points of Bowling Green and others.

Would you look down that list in column two and I will give you time to look at it; you have one of three sheets.

Let me ask you in connection with your present runs, would you be able to give dependable single line service, in the way you describe to all the towns listed in that column two?

A. No, I can't give service, dependable service to the river towns down East.

Q. Okay.

A. I could serve them but not economically.

* * *

### REDIRECT EXAMINATION

(Page 153)

BY MR. BEERY:

Q. Sir, on cross examination you were asked about a Youngstown run which I think you listed on your Exhibit Number — may we have the Exhibits, please — Exhibit Number 2.

Based upon your knowledge normally do you have runs into that area every day?

A. Every day, yes.

Q. Normally wouldn't you have space available for additional freight on that run?

A. I think the record shows the percentage of room available in each vehicle.

Q. Let's see what it was on this one.

EXAMINER ZUBER: Ninety-five, load number two.

Q. All right, thank you.

A. May I add that particular record, 95 percent of that freight was picked up in Cincinnati and moved that same night.

Q. All right. As far as your general service that you provide via the method depicted in Exhibit D, has this been overnight service?

(Page 154)

A. Generally.

Q. Yes, and are the runs shown on Exhibit B typical of the runs over into that area of the state?

A. They are typical of daily operation.

Q. Fine. Thinking of a less than truck load —in fact, let's take a minimum movement from Bryan to Youngstown, Ohio.

Would you explain, and assuming the minimum had revenue of $6.00 we will say, why would it be economical financially for your company to haul this mini from Bryan to Cincinnati and put on the Youngstown run?

A. Well, first the run is coming in from Bryan and the mini $6.00 is taking a ride to Cincinnati on that run.

Then it moves out on the other run and there again takes another ride on a 500 percent load and we have already added $6.00 of revenue to the two operations.

We pick up $3.00 in each instance.

Q. And you are actually making —

A. We would pick up $3.00 on that one coming in and that one going out.

It is that simple.

Q. And you are using this run presently?

A. They are and they are available.

What I mean is more freight on them.

(Page 155)

Q. You were asked about the river areas and you indicated on Cross Examination that it would be difficult to make those areas.

If you were given certain river freight would you say that it could make the points?

A. We do this; we make every effort to see freight gets delivered to every point that we are given on freight.

MR. BEERY: I have nothing further.

EXAMINER ZUBER: Any recross?

MR. BRANDON: No, no; thank you.

Paul F. Bauer
Paul F. Bauer Co., L.P.A.
6 East Broad Street
Columbus, Ohio 43215
614/224-5575
*Attorney for Petitioner*

## TABLE OF CONTENTS


| | PAGE |
|---|---|
| Table of Authorities | ii |
| Pertinent Constitutional and Statutory Provisions | iii |
| Statement of the Case | 1 |
| Argument One | 3 |
| PETITIONER HAS NOT BEEN DEPRIVED OF ANY RIGHT, PRIVILEGE OR IMMUNITY GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES. | |
| I. Whether a certificate of public convenience and necessity should issue authorizing transportation service in intrastate commerce is a state question. | 3 |
| II. The subject of the instant petition for writ of certiorari involves a state question which has been adjudicated fully in accordance with state law. | 5 |
| III. The due process clause of the Fourteenth Amendment of the Constitution of the United States does not require that the Supreme Court of the United States reconsider the evidence in a state proceeding involving a state question. | 6 |
| IV. In any event, The Supreme Court of Ohio did not act erroneously or arbitrarily and its holding is supported by the evidence. | 8 |
| Argument Two | 10 |
| THERE IS NO JUSTIFICATION TO REVERSE THE SUPREME COURT OF OHIO OR REMAND THIS PROCEEDING TO EITHER THE SUPREME COURT OF OHIO OR THE PUBLIC UTILITIES COMMISSION OF OHIO. | |
| CONCLUSION | 11 |
| CERTIFICATE OF SERVICE | 13 |
| APPENDIX | 14 |

## TABLE OF AUTHORITIES


PAGE

*Alabama Public Service Commission v. Southern Railway Company*, 341 U. S. 341, 71 S. Ct. 762, 95 L. Ed. 1002 (1951). ---- 6

*Bryan Truck Line, Inc., v. Public Utilities Commission of Ohio*, 38 Ohio St. 2d 103, 310 N. E. 2d 587 (1974). ---- 2

*Celina and Mercer County Telephone Co. v. The Union-Center Mutual Telephone Assoc.*, 102 Ohio St. 487. ---- 5

*Commercial Motor Freight, Inc., v. Public Utilities Commission of Ohio*, 156 Ohio St. 360 (1951). 10, 11

*Eichholz v. Public Service Commission*, 306 U. S. 268, 59 S. Ct. 532. ---- 3

*General Investment and Service Corp., Inc., et al. v. Wichita Water Company*, 236 F. 2d 464 (1956). 7, 8

*Harold D. Miller, Inc., v. Public Utilities Commission of Ohio*, 10 Ohio St. 2d 53 (1967). ---- 4

*Mohawk Motor, Inc., v. Public Utilities Commission of Ohio*, 11 Ohio St. 2d 238, 228 N. E. 2d 611 (1967). ---- 8, 9

*Motor Service Company, Inc., v. Public Utilities Commission of Ohio*, 39 Ohio St. 2d 5 (1974). 10, 11

*North Carolina v. United States*, 325 U. S. 507, 67 S. Ct. 1260, 89 L. Ed. 60. ---- 3

*Palmer v. Commonweath of Massachusetts*, 308 U. S. 79, 60 S. Ct. 34, 84 L. Ed. 93 (1934). ---- 3

## PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

*PAGE*

**(See Appendix for complete text)**

The provisions of the Constitution of the United States pertinent to this matter are:


Article 1, Section 8 ..... 3
The Tenth Amendment ..... 3


The provisions of the Constitution of Ohio pertinent to this matter are:


Article 1, Section 1 ..... 4
Article 1, Section 19 ..... 4
Article 4, Section 2 ..... 5


The federal statutes pertinent to this matter are:


49 U.S.C. 1 ..... 3
49 U.S.C. 302 (b) ..... 3


The Ohio Statutes pertinent to this matter are:


4903.09 ..... 5
4903.12 ..... 5
4903.13 ..... 1, 5
4905.02 ..... 3
4905.03 ..... 3

## STATEMENT OF THE CASE

By application filed with the Public Utilities Commission of Ohio, hereinafter sometimes referred to as "commission", on February 13, 1970, as amended, Husman Express Co., petitioner herein, hereinafter referred to as Husman or petitioner, sought a certificate of public convenience and necessity authorizing operation in intrastate commerce, as a common carrier, by motor vehicle, over irregular routes, for the transportation of property from and to Bryan, Ohio, restricted against the transportation of household goods, office furniture and fixtures, commodities usually handled in dump trucks and unloaded by dumping, and commodities which, by reason of size or weight, require special equipment to load and unload.

A public hearing was held on March 12, 1970, at Bryan, Ohio. Bryan Truck Line, Inc., respondent herein, the holder of a certificate of public convenience and necessity authorizing the transportation of property, without qualification, from and to Bryan, Ohio, was a protestant, and, as such, adduced evidence in opposition to said application.

The attorney examiner made a recommendation to the commission that the application be denied.

On May 24, 1973, the commission issued its opinion and order in which it reversed the recommendation of its attorney examiner and granted the application, subject to the statutory sixty day order to respondent.

Respondent appealed the order of the commission to The Supreme Court of Ohio.

The Supreme Court of Ohio, following the statutory guidelines set forth in Section 4903.13, Ohio Revised Code, found the order of the commission to be unreason-

able and unlawful and, therefore, reversed said decision. The court stated in part:

> "Assuming that there is sufficient evidence in the record to support the commission's finding of a need for overnight, less-than-truckload service from and to Bryan, Ohio, the record is totally devoid of any evidence that either applicant would, if this application for certificate were granted, provide the overnight service. The order of the commission is unreasonable and unlawful and is, therefore, reversed." *Bryan Truck Line, Inc., v. Public Utilities Commission of Ohio*, 38 Ohio St. 2d 103, 106, 310 N. E. 2d 587, 589 (1974).

The only question presented by petitioner, as set forth at page two of the petition for writ of certiorari, is the following:

> "Whether, in reversing the order of the Public Utilities Commission of Ohio, the Supreme Court of the State of Ohio deprived petitioner of the opportunity to provide intrastate transportation service from and to Bryan, Ohio, without due process of law in violation of the Fourteenth Amendment to the United States Constitution by erroneously and arbitrarily finding that the record was 'totally devoid of any evidence' that petitioner would provide the needed overnight transportation service."

Respondent contends that The Supreme Court of Ohio did not act erroneously or arbitrarily, that the matter adjudicated is a state question, that this matter was adjudicated fully in accordance with state law, that the due process clause of the Fourteenth Amendment does not require the Supreme Court of the United States to reconsider the evidence in a state proceeding involving a state question, and that, in any event, the action of The Supreme Court of Ohio is supported fully by the evidence.

## ARGUMENT ONE

## PETITIONER HAS NOT BEEN DEPRIVED OF ANY RIGHT, PRIVILEGE OR IMMUNITY GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES

### I. Whether a Certificate of Public Convenience and Necessity Should Issue Authorizing Transportation Service in Intrastate Commerce is a State Question.

Section 8 of Article 1 and the Tenth Amendment to the Constitution of the United States provide that the question of *intrastate* commerce is a state question.

More specifically, the Interstate Commerce Commission is empowered to regulate interstate commerce and the power to regulate intrastate commerce is reserved to the several states. See 49 U.S.C. Sections 1, par. (17) and 302 (b).

In addition, the Supreme Court of the United States has held that intrastate commerce is the concern of the states. See, for example, *Eichholz v. Public Service Commission,* 306 U.S. 268, 274, 59 S. Ct. 532, 535; *North Carolina v. United States,* 325 U. S. 507, 511, 67 S. Ct. 1260, 1263, 89 L. Ed. 60, and also *Palmer vs. Commonwealth of Massachusetts* 308 U. S. 79, 60 S. Ct. 34, 84 L. Ed. 93 (1934).

The legislature of the State of Ohio has seen fit to create a public utilities commission, which oversees utilities in the State of Ohio.

Title 49 of the Ohio Revised Code contains all of the powers of the Public Utilities Commission of Ohio. Sections 4905.02 and 4905.03, Ohio Revised Code, contain the Ohio statutory definition of a "public utility", which includes a "motor transportation company".

Chapter 4921 of the Ohio Revised Code provides for the regulation of "motor transportation companies".

It is also useful to note the controlling Ohio law as to what is a "certificate of public convenience and necessity". The Supreme Court of Ohio has concluded that:

> "A certificate of public convenience and necessity issued to a motor transportation company pursuant to Chapter 4921, Revised Code, is a revocable license conferring no property rights upon the holder." *Harold D. Miller, Inc., v. Public Utilities Commission,* 10 Ohio St. 2d 53 (1967).

It must be remembered here that the petitioner holds no certificate of public convenience and necessity from and to Bryan, Ohio.

Respondent asserts further that regulation over public utilities and the effect of regulation on a "person" desiring to become a public utility, as it relates to constitutional rights, is well settled in Ohio law.

When considering specifically Sections 1 and 19 of Article 1 of the Constitution of Ohio, as they relate to a "public utility" as hereinbefore described, The Supreme Court of Ohio has stated:

> "Provisions of Section 54 of the Public Utilities Act (Section 614-52 General Code) (now Section 4905.24 Revised Code), in which it is provided that no telephone company shall exercise any permit, right, license or franchise, to own or operate a plant for the furnishing of any telephone service, in any municipality or locality, where there is in operation as a telephone company furnishing adequate service, unless such telephone company first secures from the commission a certificate that the exercising of such license, permit, right or franchise is proper and necessary for the public convenience, are regulatory in nature and effect and not inconsistent with the 'right of acquiring, possessing, and protecting property', guaranteed under Section 1, Article 1, Bill of Rights; nor do they contravene Sec-

> tion 19 Article 1, Bill of Rights, in respect to the inviolability of property rights and the due compensation necessary when taken for public use."

The court went on to say in the same case:

> "Section 614-52 General Code (now Section 4905.24 Revised Code), does not deny the equal protection of the laws nor abridge the privileges or immunities of the citizens of the United States." *Celina and Mercer County Telephone Company v. The Union-Center Mutual Telephone Association* 102 Ohio St. 487.

Respondent asserts two principles that are controlling here. The first is that because the subject of this proceeding is *intrastate commerce*, it is a state question; the second is that, being a state question, the Supreme Court of Ohio has announced the law of Ohio as it pertains to petitioner's "rights, privileges or immunities".

**II. The Subject of the Instant Petition for Writ of Certiorari Involves a State Question Which Has Been Adjudicated Fully in Accordance With State Law.**

Section 2 of Article 4 of the Constitution of Ohio provides that The Supreme Court of Ohio shall have original jurisdiction in "(B) (2) (c) such revisory jurisdiction of the proceedings of administrative officers or *agencies* as may be conferred by law." (Emphasis supplied).

What is conferred by law is a sequence of Ohio statutes that specify the duties of the public utilities commission in issuing its orders and the duties of The Supreme Court of Ohio in reviewing those orders. See Sections 4903.09, 4903.12, and 4903.13, Ohio Revised Code.

Of special importance is Section 4903.13, Ohio Revised Code, which provides in part:

> "A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, *upon consideration of*

> *the record*, such court is of the opinion that such order was unlawful or unreasonable." (Emphasis supplied.)

It is necessary to note that the Supreme Court of the United States has had occasion to make a determination in an Alabama case, wherein the Alabama procedure was very similar to the above stated Ohio procedure. The Supreme Court of the United States held:

> "The fact that review in the Alabama courts is limited to the record taken before the commission presents no constitutional infirmity . . . and, whatever the scope of review of commission findings when an alleged denial of constitutional rights is in issue, it is now settled that a utility has no right to relitigate factual questions on the grounds that constitutional rights are involved." *Alabama Public Service Commission v. Southern Railway Company* 341 U. S. 341, 71 S. Ct. 762, 95 1002 (1951).

**III. The Due Process Clause of the Fourteenth Amendment of the Constitution of the United States does not require that the Supreme Court of the United States reconsider the Evidence in a State Proceeding Involving a State Question.**

The petition here is not raising a question of interpretation of a state law, but rather it is raising a question of evidence in a state proceeding. As was just noted in *Alabama Public Service Commission v. Southern Railway Company, supra*, the Supreme Court of the United States has stated:

> "And, whatever the scope of review of commission findings when alleged denial of a constitutional right is an issue, it is now settled that a utility has no right to relitigate factual questions on the ground that constitutional rights are involved."

Respondent submits that the above decision clearly demonstrates the theory of "federal-state comity". This

theory is applicable to this proceeding where the Constitution of Ohio and the Ohio statutes give the power to the highest court in the state to review orders of the Public Utilities Commission of Ohio. The Supreme Court of Ohio, pursuant to the Constitution of Ohio and statutory provisions, must take into consideration *the record* in order to determine if the order of the Public Utilities Commission of Ohio is unlawful or unreasonable. Thus, the petitioner here has had a full opportunity, at the state level, for a just and fair adjudication. When a party has had a fair and just adjudication at the state level, particularly a fair and just adjudication of a state question at the state level, there is no need for the federal courts to disturb the holding of the state court. It has been stated by the federal courts that:

> "The principle is well established and without dispute that under the rule of comity under our dual system of government involving state laws, rules or regulations, equitable considerations will under certain circumstances require federal courts to stay their hands where the parties have an adequate, speedy and complete determination of the controversy in a state tribunal. No cases need be cited to support this statement. It is recognized without exception. The Supreme Court has held that where there is pending in Federal Court a case involving the construction of a state law and if one construction would remove the federal question a federal court should stay its hand, retain jurisdiction and relegate the parties to the state court to first seek a construction of the statute. *Other cases hold that where parties have come into federal court for determination of rights, the federal court should not only stay its hand but should dismiss the action, where there is available in the state courts a complete and adequate remedy for the determination of the same questions presented in the federal action.*"

*General Investment and Service Corporation, Inc., et al., v. Wichita Water Company,* 236 Federal 2d 464, 468 (1956). (Emphasis supplied.)

Although *General Investment and Service Corporation, Inc., et al., supra,* appears to involve a federal proceeding where a state proceeding was pending at *the same time,* respondent asserts that the same principle of comity applies here where the state proceeding has been *completed.* There is no need here for the federal court to review a question of *evidence* in a state proceeding involving a state question.

Respondent submits that the Supreme Court of the United States, in the cases cited herein, has recognized, generally, that a public utilities commission of a state has acknowledged expertise in the area of intrastate commerce. Respondent further submits that it is just as clear that the Supreme Court of the United States has recognized that, in order to afford parties due process of law, a judicial appeal from a state public utilities commission ruling is necessary. This judicial appeal has been taken by the respondent in the proceeding in question. It is evident that the Supreme Court of Ohio acted to protect the respondent's due process of law as well as petitioner's due process of law.

**IV. In Any Event, The Supreme Court of Ohio Did Not Act Erroneously or Arbitrarily and Its Holding is Supported by the Evidence.**

Respondent agrees with petitioner that the law of Ohio is:

> "An applicant for an irregular route certificate of public convenience and necessity to transport property from and to a specific location assumes the burden of proving not only that there is a need for such service, but also that the granting of the application will correct any deficiency in the service pro-

vided the public by an existing certificate holder." *Mohawk Motor, Inc., vs. Public Utilities Commission* (1967), 11 Ohio St. 2d 238, 228 N. E. 2d 611.

The claim of petitioner of lack of due process relating to the finding by The Supreme Court of Ohio that the record was "totally devoid" of any evidence that petitioner would provide the needed overnight transportation service is without merit.

Petitioner has extracted certain parts of the testimony out of context to support its position.

The requirement of *Mohawk, supra,* that is involved here is whether the applicant showed "that the granting of the application will correct any deficiency in the service provided the public by an existing certificate holder". In other words, the question was whether or not petitioner, as a matter of record, was in a position, at the time of the hearing, to provide overnight less-than-truckload service between Bryan, Ohio, on the one hand and, on the other hand, *all points in Ohio.*

Indeed, the record is totally devoid of any such evidence.

The evidence of record is that petitioner sometimes provides overnight less-than-truckload service to its terminal areas; that it sometimes does not provide overnight less-than-truckload service to its terminal areas and that there are many parts of the state to which it provides no less-than-truckload service at all. (See Appendix B for official record, pages 146, 147, 148 and 149).

It is clear that the petitioner did not meet the requirements of *Mohawk, supra,* for the issuance of a certificate. Therefore, the Supreme Court of Ohio did not act erroneously or arbitrarily in reversing the order of the Public Utilities Commission of Ohio.

## ARGUMENT TWO

## THERE IS NO JUSTIFICATION TO REVERSE THE SUPREME COURT OF OHIO OR REMAND THIS PROCEEDING TO EITHER THE SUPREME COURT OF OHIO OR THE PUBLIC UTILITIES COMMISSION OF OHIO

Although respondent contends that argument one hereinbefore presented adequately demonstrates why this petition should be denied, brief mention will be made contra to arguments two and three of petitioner.

Respondent asserts that in its argument two, petitioner has cited a decision of The Supreme Court of Ohio out of context.

Petitioner refers to *Motor Service Company, Inc., v. Public Utilities Commission,* 39 Ohio St. 2d 5 (1974), as stating the following:

> "Nowhere in the commission's opinion and order are there findings of fact or reasons supporting the issuance of the aforementioned orders, nor does any citation to the record indicate support for or reasons behind such orders.
>
> "It is the opinion of this court that the commission failed to make specific findings of fact, supported by the record, or to state reasons derived therefrom, which prompted its decision, in violation of the requirements of R. C. 4903.09.
>
> "For the foregoing reasons, the decision of the Public Utilities Commission is affirmed in part and reversed in part and the cause is remanded to the commission for further proceedings in accordance with this opinion."

In making such a statement, the court relies heavily on *Commercial Motor Freight, Inc., v. Public Utilities Commission,* 156 Ohio St. 360 (1951). The court in *Motor Service Company, Inc., supra,* used the following hold-

ing from *Commercial Motor Freight, Inc., supra,* at Page 14:

> "Probably the principal purpose of Section 614-46a, General Code, was to enable this court to review the action of the commission without reading the voluminous records in the Public Utilities Commission cases. Where the commission states the facts found upon which it bases its decision, this court can usually readily determine, as it is required to do by Section 544, General Code, whether the order of the commission is 'unlawful or unreasonable'. *A review of the essential facts so found can also be made with the help of record references supplied by opposing counsel in their briefs.* The General Assembly never intended this court to perform the same functions and duties as the Public Utilities Commission but it did intend that *this court should determine whether the facts found by the commission lawfully and reasonably justified the conclusions reached by the commission in its order and whether the evidence presented to the commission as found in the record supported the essential findings of fact so made by the commission."* (Emphasis supplied.)

It is obvious that The Supreme Court of Ohio felt that the record was "totally devoid" in the proceeding which is the subject of this petition for writ of certiorari. Just as obvious is that the court found the record "totally devoid" *upon consideration of the record* taken and with the help of the record references supplied by opposing counsel in their briefs. Again, it is clear The Supreme Court of Ohio acted to protect the due process of the respondent as well as the petitioner.

## CONCLUSION

The point that respondent makes in response to the arguments of petitioner leaves the query "why does

petitioner desire the Supreme Court of the United States to tread upon the same ground over which The Supreme Court of Ohio has already tread?" Citing parts of transcripts most favorable to one's position is a natural tendency of an advocate. Respondent does not wish to merely submit the cross-examination of the same witnesses or other parts of the transcript that are contra to make its point. The Supreme Court of Ohio, using proper precedents from Ohio law and upon *consideration of the record taken,* has made an accurate and proper ruling.

The respondent here asserts that petitioner has asserted no substantial federal question for review by this court. Respondent further asserts that the Constitution of the United States, prior decisions of this court and other federal courts and the law of the State of Ohio, all clearly demonstrate that a citizen of Ohio, petitioner, has not been deprived of the opportunity to provide intrastate transportation service from and to Bryan, Ohio, without due process of law. The petition for writ of certiorari should be denied.

Respectfully submitted,

JAMES DUVALL
JAMES R. BERENDSEN
SANBORN, BRANDON & DUVALL
505 Hartman Building
Columbus, Ohio 43215
614/221-2361
*Attorneys for Respondent*

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief in Opposition to Petition for Writ of Certiorari was sent by regular United States mail to Paul F. Beery of the firm of Paul F. Beery Co., L.P.A., 8 East Broad Street, Columbus, Ohio, on this 25 day of October, 1974.

JAMES DUVALL
*Attorney for Respondent*

## APPENDIX

Respondent recognizes petitioner's appendices A through D as containing appropriate decisions of the Supreme Court of Ohio and the Public Utilities Commission of Ohio in this matter.

## APPENDIX A

The respondent provides the following text from the cited materials:

The provisions of the Constitution of the United States pertinent to this matter are:

> Article 1, Section 8
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;
> Tenth Amendment
> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

The provisions of the Constitution of Ohio pertinent to this matter are:

> Article 1, Section 1
> All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing, and protecting property, and seeking and obtaining happiness and safety.
> Article 1, Section 19
> Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other

cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

Article 4, Section 2

(A) . . .

(B) (2) The supreme court shall have appellate jurisdiction as follows:

(c) Such revisory jurisdiction of the proceedings of administrative officers of agencies as may be conferred by law;

The federal statutes pertinent to this matter are:

49 U.S.C. 1, par. (17)

That nothing in this chapter shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except insofar as such requirement is inconsistent with any lawful order of the commission made under the provisions of this chapter and except as otherwise provided in this chapter.

49 U.S.C. 302(b)

Nothing in this part shall be construed to affect the powers of taxation of the several States or to authorize a motor carrier to do an intrastate business on the highways of any State or to interfere with the exclusive exercise by each State of the power of regulation of intrastate commerce by motor carriers on the highways thereof.

The Ohio Statutes pertinent to this matter are:

4903.09 Ohio Revised Code

In all contested cases heard by the public utilities commission, a complete record of all of the proceedings shall be made, including a transcript of all testimony and of all exhibits, and the commission shall file, with the records of such cases, findings of fact

and written opinions setting forth the reasons prompting the decisions arrived at, based upon said findings of fact.

4903.12, Ohio Revised Code

No court other than the supreme court shall have power to review, suspend, or delay any order made by the public utilities commission, or enjoin, restrain, or interfere with the commission or any public utilities commissioner in the performance of official duties. A writ of mandamus shall not be issued against the commission or any commissioner by any court other than the supreme court.

4903.13, Ohio Revised Code

A final order made by the public utilities commission shall be reversed, vacated, or modified by the supreme court on appeal, if, upon consideration of the record, such court is of the opinion that such order was unlawful or unreasonable.

The proceeding to obtain such reversal, vacation, or modification shall be by notice of appeal, filed with the public utilities commission by any party to the proceeding before it, against the commission, setting forth the order appealed from and the errors complained of. The notice of appeal shall be served, unless waived, upon the chairman of the commission, or, in the event of his absence, upon any public utilities commissioner, or by leaving a copy at the office of the commission at Columbus. The court may permit any interested party to intervene by cross-appeal.

4905.02, Ohio Revised Code

As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code, "public utility" includes every corporation, company, copartnership, person, or association, their lessees, trustees, or receivers, defined in section 4905.03 of the Revised Code, including all telephone companies, but excepting such other public utilities as operate their utilities not for profit, such other public utilities as are owned or operated

by any municipal corporation, and railroads as defined in sections 4907.02 and 4907.03 of the Revised Code.

4905.03, Ohio Revised Code

As used in sections 4905.01 to 4905.64, inclusive, of the Revised Code:

(A) Any person, firm, copartnership, voluntary association, joint-stock association, company, or corporation, wherever organized or incorporated, is:

(3) A motor transportation company, when engaged in the business of carrying and transporting persons or property or the business of providing or furnishing such transportation service, for hire, in or by motor-propelled vehicles of any kind, including trailers, for the public in general, over any public street, road, or highway in this state, except as provided in section 4921.02 of the Revised Code;

## APPENDIX B

(examination of witness for Husman Express Co.)

"**Q.** Do I understand then that under your present proposal that all traffic from Bryan will originate in somewhat the same way it does now, by your local cartage company, thence via over the road trailer to the main terminal in Cincinnati?

"**A.** That's right.

"**Q.** Thence it will be broken down and reloaded out to other points in Ohio; is that basically what you have in mind?

"**A.** Basically, correct.

"**Q.** Would you look at the Exhibit the gentleman from Ohio Art Company submitted; I believe it is identified as Exhibit 3 and in column two of that Exhibit he listed a number of points which he characterized as being points where there was no dependable direct LTL service. Some comment was made about the points of Bowling Green and others. Would you look down that list in column two and I will give you time to look at it; you have one of three sheets. Let me ask you in connection with your present runs, would you be able to give dependable single line service in the way you describe to all the towns listed in that column two?

"**A.** No, I can't give service, dependable service to the river towns down East.

"**Q.** Okay.

"**A.** I could serve them but not economically.

"**Q.** The way your present runs are now on your Exhibit B, they leave several portions of the State of Ohio unattended, do they not?

"**A.** That's correct.

"**Q.** Now, looking at the Exhibit sponsored by the Aro Corporation and also Exhibit Number 5, did you get a copy of that?

"**A.** I have seen it.

"**Q.** It has some points with stars in front of them; Paul will hand you a copy of that.
"**A.** Okay.
"**Q.** And I believe the gentleman indicated that the reason for the star was that he believed that there was no direct service from Bryan. Now looking at those points with the stars in front of them, what kind of service would you offer to those particular towns?
"**A.** I sure could help out on Youngstown.
"**Q.** Just with Youngstown; you would take a shipment from Bryan south 180 miles back to Cincinnati, thence about 250 miles or 300 miles?
"**A.** 300 miles.
"**Q.** Northeast to Youngstown?
"**A.** Right.
"**Q.** So you are going to travel over 500 miles to get from Bryan to Youngstown, right, the way you are going to run it?
"**A.** No; I don't think you understand. We haul freight; we load these on the revenue they produce and when we can produce enough revenue to move the freight we move it. It costs $1.16 a mile to move these. When we have enough to proceed with the run we move it and our volume is such as can move as often as we want to.
"**Q.** My question is do you feel —
"**A.** This particular piece of freight I would personally drive it over in my car.
"**Q.** This shipment actually would go close to 500 miles actual load, wouldn't it?
"**A.** It stays overnight in Chicago. It doesn't matter how many miles it is going.
"**Q.** And the fact that it would be handled that way would depend on whether or not you are able to load directly for Youngstown a sufficient number of times per week to handle it in that way?
"**A.** That's right.
"**Q.** This would be true of any of the runs you exhibit on Exhibit D?

"**A.** That's right. Those aren't necessarily serviced every day on all the towns you had. We don't hit the same town each day, you understand that?

"**Q.** I understand. I was asking in say run number six where you pick up some the western part of the state. You showed that one on your Exhibit, didn't you?

"**A.** Yes.

"**Q.** You wouldn't run that every day, that combination, would you?

"**A.** No, not that combination of towns but similar areas would be serving different towns in the same area.

"**Q.** Well, what you would do is collect enough freight there in Cincinnati to make up one of these peddle runs?

"**A.** That's right, that's right.

"**Q.** Do you know how long it took you to collect freight to make up run number six?

"**A.** I don't, no. Freight isn't held over a day or two at our break bulk terminal."